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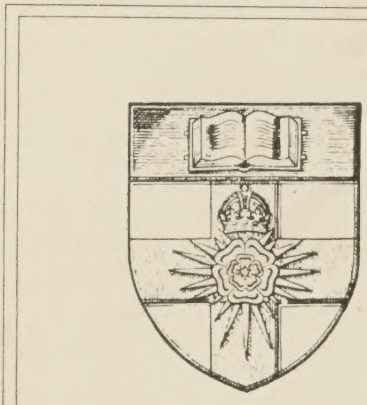

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THE IRISH REPORTS.

1918—Vol. I.

IRISH REPORTS 1894-

REPRINT 1976

Printed and Published
in Great Britain by
Professional Books Limited,
of Milton Trading Estate,
Milton, Abingdon, Oxon.

PB

PROFESSIONAL BOOKS LIMITED

THE IRISH REPORTS

PUBLISHED UNDER

THE CONTROL OF THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND.

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE COURT OF APPEAL,

THE HIGH COURT OF JUSTICE,

THE COURT FOR CROWN CASES RESERVED,

IN IRELAND,

AND

THE IRISH LAND COMMISSION.

EDITED BY

T. HENRY MAXWELL,

ONE OF HIS MAJESTY'S COUNSEL.

1918.

VOL. I.

CHANCERY DIVISION AND LAND COMMISSION.

DUBLIN:

PUBLISHED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND

BY E. PONSONBY, LTD.,

116, GRAFTON STREET.

1918.

BIBL. LONDIN. UNIV.

DUBLIN:

PRINTED FOR THE INCORPORATED COUNCIL OF LAW REPORTING FOR IRELAND

At the University Press,

BY PONSONBY AND GIBBS.

Lord Chancellors.

The Right Hon. Sir Ignatius John O'Brien, Bart.

The Right Hon. Sir James Henry Mussen Campbell, Bart.

Lords Justices of Appeal.

The Right Hon. Stephen Ronan.

The Right Hon. Thomas Francis Molony.

The Right Hon. James O'Connor.

Chancery Division.

The Right Hon. Charles A. O'Connor M.R.

The Hon. Dunbar Plunket Barton.

The Right Hon. James O'Connor.

The Hon. John Blake Powell.

Land Judge.

The Right Hon. John Ross.

Irish Land Commission: Judicial Commissioners.

The Right Hon. J. O. Wylie.

The Hon. Gerald FitzGerald.

Attorneys-General.

The Right Hon. James O'Connor K.C.

The Right Hon. Arthur Warren Samuels K.C.

Solicitors-General.

Arthur Warren Samuels K.C.

John Blake Powell K.C.

[These Reports will be cited as follows :—[1918] 1 I.R.]

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Court of Appeal,	R. St. J. Chadwick, C. Lehane,	Barristers-at-law.
Master of the Rolls,	William Lawson, A. H. Webb,	Barristers-at-Law.
Mr. Justice Barton,	R. W. Lucas, D. M. Stern,	Barristers-at-Law.
Land Judge,	T. C. Tobias,	Barrister-at-Law.
Land Commission,	John Edwd. Walsh,	Barrister-at-Law.

CORRIGENDA.

Page 81, add reference at foot, "[1916] 1 I.R. 97."

,, 246, line 8, *for* "defence" *read* "claim".

,, 300, line 18, *for* "rental" *read* "recital".

MEMORANDA.

The Hon. Dunbar Plunket Barton having resigned, the Right Hon. James O'Connor was, on 23rd April, 1918, appointed a Judge of the Chancery Division in Ireland.

On 23rd April, 1918, Arthur Warren Samuels K.C. was appointed His Majesty's Attorney-General for Ireland.

On 23rd April, 1918, John Blake Powell K.C. was appointed His Majesty's Solicitor-General for Ireland.

On 8th June, 1918, the Right Hon. Sir Ignatius John O'Brien having relinquished the Great Seal, the Right Hon. Sir James Henry Mussen Campbell, Baronet, Lord Chief Justice, was appointed Lord High Chancellor of Ireland.

On 19th August, 1918, the Right Hon. Thomas Francis Molony, Lord Justice of Appeal, was appointed Lord Chief Justice of Ireland.

On 21st August, 1918, the Right Hon. Mr. Justice James O'Connor was appointed a Lord Justice of Appeal in Ireland.

On 2nd December, 1918, John Blake Powell K.C. was appointed a Judge of the Chancery Division in Ireland.

On 2nd December, 1918, Denis Stanislaus Henry K.C. was appointed His Majesty's Solicitor-General for Ireland.

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CASES

DETERMINED BY

THE CHANCERY DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND

AND BY

THE IRISH LAND COMMISSION,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL.

1918.

IN THE MATTER OF THE ESTATE OF WILLIAM MORRIS COLLES (1).

Appeal.
1917.
Nov. 22.

Settlement—Construction—Equitable interests in realty—No words of limitation—Trust to convey—Period of distribution.

By a marriage settlement real property was conveyed to a trustee upon trust, after the solemnization of the marriage, to permit the wife to receive the rents for her life, then to permit the husband to receive the rents for his life, should he survive, then upon trust to convey the property to the children of the marriage, subject to appointment, and in default of appointment to the children of the marriage, if more than one, share and share alike, and if only one, then to such only child, and upon further trust, after the death of the survivor of the husband and wife, in case there should not be any issue of the marriage, to convey the property to S. and G., sisters of the wife, their and each of their executors, administrators, and assigns; and if either of them should die leaving issue, then upon trust to convey the share of her so dying to her issue, if more than one, share and share alike, and upon trust after the decease of the wife, husband, S. and G., without issue of any of them, to convey the property unto the children of the late H. B., if more than one, share and share alike; and if only one such child, the whole to such only child. There was no issue of the marriage. S. and G. died unmarried. Both they and the husband died in the lifetime of the wife. She subsequently

(1) In the Court of Appeal before O'CONNOR M.R. and RONAN and MOLONY L.JJ.

Appeal. 1917.

In re COLLES'S ESTATE.

died. There were ten children of H. B. living at the date of the settlement, eight of whom survived the wife.

Held, by the Court of Appeal (affirming the decision of Wylie J.), that the period of distribution of the trust estate was the date of the death of the survivor of the wife, husband, S. and G., and that, in the events which had happened, the children of H. B., then surviving, were entitled to call for a conveyance.

This was an appeal by Miss E. G. Maddock and G. Daly from, an order of Wylie J., dated the 24th March, 1917, by which the learned judge held that on the true construction of a marriage settlement, dated the 15th October, 1863, and made on the occasion of the marriage of Eliza Abbott with Edward G. Daly, and in the events which had happened, the children of Henry Bailey living at the date of the death of the survivor of the said Eliza Abbott and Edward G. Daly, and Sarah Eliza Abbott and Grace Abbott, sisters of the said Eliza Abbott, were entitled to call for a conveyance of the trust property.

The facts appear sufficiently from the report of the case ([1917] 1 Ir. p. 260) and from the head-note.

H. D. Conner K.C., *Carrigan K.C.* (*J. R. Peart*, with them), for the appellants. (Their arguments were the same as in the court below.)

J. E. Walsh and *E. J. Phelps*, for the respondents, the children of Henry Bailey, were not called upon.

THE MASTER OF THE ROLLS :—

Wylie J. has held that the ultimate trust contained in this settlement in favour of the children of Henry Bailey is a valid trust and capable of taking effect. That was a trust to arise after the death of the survivor of the four parties named "without issue of any of them," and the only question which calls for decision arises on the submission of Mr. Conner and Mr. Carrigan, who have contended that these words refer to an indefinite failure of issue, and that the gift over is accordingly void. The property put into settlement consisted of both lands and personal property, and these were by the settlement vested in trustees upon trust for Eliza Abbott, the intended wife, during her life for her sole and

separate use, and after her death upon trust for Edward George Daly, the intended husband, during his life, with remainder to the children of the marriage as the wife should appoint, or in default of appointment to the children as tenants in common. Then these trusts follow:—"After the death of the survivor of them the said Edward George Daly and Eliza Abbott in case there shall not be any issue of said intended marriage and it is the true intent and meaning of these presents to convey and assign the said lands and premises and property hereby conveyed assigned and assured or expressed so to be unto the said Sarah Eliza Abbott and Grace Abbott sisters of the said Eliza Abbott their and each of their heirs executors administrators and assigns and if either of them the said Sarah Eliza Abbott and Grace Abbott shall die leaving issue then upon trust to convey and assign the share of her so dying to her issue if more than one share and share alike and upon further trust after the decease of the survivor of them the said Edward George Daly Eliza Abbott Sarah Eliza Abbott and Grace Abbott without issue of any of them to convey assign and assure the said lands and premises and property hereby conveyed assigned and assured or expressed or intended so to be unto the children of the late Henry Bailey if more than one share and share alike and if only one such child then the whole to such only child."

There was no issue of the marriage; the wife's two sisters died unmarried in the wife's lifetime, and the husband also predeceased the wife. At the death of the wife there were children of Henry Bailey surviving; at the date of the settlement ten of such children had been living, but the class was reduced to eight at the death of the wife. The net question then is: Are these eight children entitled in the events that have happened to the property the subject-matter of the settlement?

Now it appears to me that a leading feature of this settlement is, as shown by its framer, that it was the intention of the settlor that the trusts should be closed absolutely on the death of the survivor of the four persons named—the wife and husband and the wife's two sisters—in case there was no issue of the marriage and no issue of either of the two sisters. No doubt, after the limitation of the trusts in favour of the children of the marriage,

Appeal. 1917. *In re* COLLES'S ESTATE. O'Connor M.R.

there is a direction to the trustees to convey and assign the trust premises to Eliza Abbott and Grace Abbott, their and each of their heirs, executors, administrators, and assigns; but Wylie J. has held, and I agree in his conclusion, that the subsequent limitations show clearly that it was the intention of the settlor that these ladies should take absolutely only in the event of their surviving the husband and wife, the latter having died without issue. The settlement goes on to say :—"If either of them, the said Sarah Eliza Abbott and Grace Abbott, shall die leaving issue then upon trust to convey and assign the share of her so dying to her issue if more than one, share and share alike." That plainly shows that the estate given to these two ladies was not to vest in them unless they survived the last tenant for life under the settlement, because if one died her issue was to be substituted for her; and, therefore, Wylie J. naturally held that as both these ladies died in the lifetime of the wife neither took anything. The settlement then goes on :—"Upon further trust after the decease of the survivor of them, the said Edward George Daly, Eliza Abbott, Sarah Eliza Abbott, and Grace Abbott without issue of any of them, to convey, assign, and assure the said lands and premises and property hereby conveyed . . . unto the children of the late Henry Bailey." There, again, it appears to me we find a manifest intention to put an end to the trusts immediately on the death of the last survivor of these four persons named. What, then, were the trustees to do? Obviously they were to convey the property to the person or persons then absolutely entitled. Once we arrive at the conclusion that the point of time at which the class which is to be absolutely entitled to the property is to be ascertained is at the death of the survivor of these four persons, all difficulty as to the meaning of the words "without issue of any of them" is removed. These words must point to either a failure of issue at the point of time when the previous estates became determined, or an indefinite failure of issue. If an indefinite failure of issue is meant, the trustees of the settlement could not, as the settlor intended, have divested themselves of the trusts of the property—they could not legally and without committing a breach of trust have done that which the settlement directs them to do, namely, convey, assign, and assure the property to those entitled at the

death of the survivor of the four persons named. It must be remembered that this settlement comprised personal property as well as real estate; it was intended to operate on this personal estate; and it was the intention of the settlor that the trustees at that particular time should be enabled to do some act which would have the effect of discharging them from the trusts of the settlement. That could not be done if they had to wait for an indefinite failure of issue. We have only to ascertain what was the intention of the settlement, because I do not think that there is any distinction at all to be taken between deeds and wills when the Court is endeavouring to ascertain the meaning of an indefinite phrase such as this. We all know the history of these words. Prior to the Wills Act the meaning which prima facie was to be attributed to them was that they imported an indefinite failure of issue, although that prima facie meaning could always have been displaced. The Wills Act changed this rule of construction, and now it rests upon anyone contending that the words import an indefinite failure of issue to prove that this is the construction of the document. The Wills Act did not, of course, affect the construction of deeds, which remains in this respect the same as was the construction of wills prior to the Wills Act; and, as I have said it was always open to a party to prove that the words "die without issue" did not import an indefinite failure of issue, but a failure of issue at a particular time. I can come to no other conclusion in this case, looking at the deed as a whole, than that the words "without issue of any of them" refer to a failure of issue on the determination of the previous estates limited by the settlement.

For these reasons, I am of opinion that the declaration of the learned judge in the Court below was right, and that the appeal should be dismissed.

RONAN L.J.:—I agree, and have nothing to add.

MOLONY L.J.:—I agree.

Solicitor for the appellants: *Richard A. Macnamara.*

Solicitors for the respondents: *Read & MacNab*; *Sellors & Co.*

R. ST. J. C.

M. R.
1917.
Nov. 13.

VUILLE, Deceased.
HAYES *v.* WILLIAMS.
(1917. No. 837.)

Will—Ademption — Gift of share of partnership property of ascertained amount—Lunacy of Testatrix—Withdrawal of share and investment in Consols.

A testatrix, a partner in a school, bequeathed her share to one of the partners in the following terms:—"To A. W. I bequeath my share of the furniture and goodwill in the F. School which amount to £600." The agreement of partnership, executed shortly after the date of the will, provided that upon the withdrawal of any partner the continuing partners should have the option to purchase the share of the withdrawing partner for £600. Shortly after the execution of the partnership agreement the testatrix was found a lunatic, and under an order in the lunacy matter the continuing partners lodged £600 to the credit of the matter, and it was invested in Consols.

Upon the death of the lunatic the question arose whether the legacy had been adeemed.

Held, that it was unnecessary to decide whether the order in lunacy worked an ademption, as the bequest was of an ascertained sum of £600, and that the legatee was entitled to the Consols in which the £600 had been invested.

Originating Summons.

The testatrix, Zeline Constance Vuille, prior to the making of her will, conducted a school at Bray, in the County of Wicklow, known as the French School, in partnership with Anna J. Williams and Caroline E. Reilly.

By her will, dated December 20th, 1891, the testatrix bequeathed her share in the school to Anna J. Williams in the following terms:—"To Anna Williams of the French School Bray I give and bequeath my share of the furniture and goodwill in the French School which amount to £600." She bequeathed one moiety of the residue of her property to the Société Évangélique de Genève, established at Geneva, 7 Rue Jabagan, and the other moiety to the Églises Independantes de Vaud Neuchatel et Genève, on the conditions therein mentioned, and appointed William Hayes and William Henry Wilson her executors.

On March 21st, 1892, a formal agreement of partnership was entered imto between the testatrix, Anna J. Williams, and Caroline E. Reilly. This agreement recited that Anna J. Williams, Caroline E. Reilly, and the testatrix had for some years past carried on the business of school mistresses in the school called the French School, Bray, but that the lessee's interest in the school premises, and the furniture, stock-in-trade, and school requisites in the school, together with the goodwill of the school, was the property of the partners thereto in equal shares, and that they had agreed that the value of the said property should be taken to amount to £1,800. Clause 1 of the agreement provided that the partnership should commence as from July 1st, 1891, and continue for a term of fifteen years, subject to determination as thereinafter mentioned, and that the whole of the property thereinbefore described should, subject to the partnership, belong to the parties in equal shares. Clause 6 provided that upon the death of any of the partners in the lifetime of the others or other of them during the partnership, or upon the withdrawal of any partner as thereinafter provided, the surviving or continuing partner or partners should have the option of purchasing the share or shares of the partner or partners dying or withdrawing of and in the said joint stock debts and partnership property for the sum of £600 for each share, but in case such surviving or continuing partner or partners should refuse or neglect to purchase and pay for the share or shares of the partner or partners so dying or withdrawing then the whole of the partnership property should on the 1st day of July then next ensuing, or immediately after, be disposed of to the best advantage, and the produce thereof divided in the proportions aforesaid. Clause 7 provided that the sum to be paid by a sole surviving or continuing partner to the personal representative of a deceased partner, or to a partner withdrawing, should be the sum of £900 instead of the sum of £600.

The testatrix was by order of the Lord Chancellor in Lunacy, dated July 22nd, 1895, declared to be a person of unsound mind and incapable of managing her person or property, and by order dated October 4th, 1895, confirming the report of the Registrar in Lunacy, Anna Jane Williams and Caroline Elizabeth Reilly were directed to lodge to the credit of the lunacy matter the sum of

M. R. 1917.

HAYES *v.* WILLIAMS.

£600, being the proportion of the capital payable to the testatrix under the said agreement. The said sum of £600 was accordingly lodged, aad invested on November 13th, 1895, in the purchase of £556 10*s.* 3*d.* New Consols. The testatrix remained of unsound mind until her death, which took place on February 10th, 1917, and on April 2nd, 1917, probate of her said will was granted to the said William Hayes and William Henry Wilson, the executors therein named. In pursuance of an order in the lunacy matter dated April 28th, 1917, the funds standing to the credit of the matter were transferred and paid to the said executors. The debts and funeral and testamentary expenses had been paid, and the residue after payment of all pecuniary legacies amounted to £4,500 or thereabouts. The said Anna Jane Williams having applied to the executors for payment of the sum of £600, this summons was taken out by them for the decision of the Court, whether Anna Jane Williams was entitled to the sum of £556 10*s.* 3*d.* New Consols, part of a sum of £2,685 18*s.* 8*d.* New Consols, standing in the names of the plaintiffs as executors of the said will, and representing the proceeds of the share of the testatrix in the goodwill of the school called the French School, Bray, and the furniture therein.

H. R. Poole, for *R. Grove White,* serving with His Majesty's Forces, for the plaintiffs:—

A question of ademption arises, having regard to the effect of the order of the 9th October, 1895, and the non-application of sects. 63 and 67 of the Lunacy Regulation (Ireland) Act, 1871, to the case of personal property other than stock.

P. Lynch K.C., for the defendant Anna J. Williams:—

There could have been no ademption here if the testatrix had remained of sound mind, and had withdrawn the money and invested it in Consols, for her share of the furniture and goodwill of the school was an ascertained sum, namely, £600, and that was really the subject of the bequest, and the investment of that sum in Consols did not work an ademption. It was not a specific bequest of her share in the goodwill of the school; it was a gift

of £600, the ascertained value of the share. *Toole* v. *Hamilton* (1) is an authority in point. The testatrix there, by a codicil, bequeathed all moneys receivable by her under the will of W. During her lifetime the testatrix received a sum of money in respect of the residuary estate of W., and lodged it in bank, and afterwards drew out some of it. Sir Andrew Porter M.R. held that the subject-matter was only adeemed as regards the money drawn from the bank, but that there was no ademption as regards the balance in hand at her death, and that it passed under the bequest. He there says (at p. 390):—"Apart from authority, the matter would in principle be analogous to a case in which the testator had got the money in bank notes, and put them in a box, setting them apart as residuary estate. The principle of ademption depends upon the destruction or alienation of the subject-matter, and all the cases of ademption turn on that principle." Applying that principle here, the subject-matter, £600, was not destroyed by being invested in Consols. Secondly, there must be an animus adimendi to constitute ademption, and the testatrix, having been of unsound mind, could have no such animus. *Latham* v. *Travers* (2) shows that there would have been no ademption here if the bequest had been of land. The judgment of Lord Macnaghten in *Attorney-General* v. *Marquess of Ailesbury* (3) is there referred to. He says that it is the duty of the Court, so far as possible, not to alter the character of the lunatic's property. See also *In re Barker* (4). Sect. 63 of the Lunacy Regulation (Ireland) Act, 1871, was relied on in *Latham* v. *Travers* (2). It enables the Lord Chancellor to sell the land or stock of the lunatic, and to dispose of the proceeds for certain purposes. There is no other statutory provision dealing with the property of a lunatic. The testatrix could have withdrawn the £600 from the partnership by giving notice; but she could not do so, being of unsound mind. The Lord Chancellor treated the partnership as at an end so far as the testatrix was concerned, and ordered the continuing partners to bring in her £600.

(1) [1901] 1 I. R. 383.
(2) [1912] 1 I. R. 306, at p. 316.
(3) 12 A. C. 672.
(4) 17 Ch. D. 241.

M. R. 1917.

HAYES v. WILLIAMS.

Devitt, for the *Attorney-General*, on behalf of the residuary legatees:—

The property here was not land or stock, which could be dealt with under sect. 63 of the Lunacy Regulation (Ireland) Act, 1871. In *Jones* v. *Green* (1), decided in England under the corresponding sections of the Lunacy Regulation Act, 1853, which did not include stock, it was held that a gift of the income of certain shares was adeemed by a sale of the shares, and an investment of the proceeds in Consols under an order in lunacy. Giffard V.-C. said that it was an omission not to include stock in the statute. That case was followed by Chitty J. in *Freer* v. *Freer* (2). The omission was remedied by the Lunacy Act, 1890, sects. 120 and 123, which enable the judge to order the sale of any property of the lunatic, and enact that the lunatic's interest in the property is not to be altered by sale. These provisions do not extend to Ireland.

If the case is to be treated as if the testatrix had remained of sound mind, there is no authority in point. The difficulty is caused by the words "which amount to £600." But for these words there would clearly have been an ademption, as the testatrix had no share in the school at the date of her death. The will was made before the date of the partnership agreement, by which the share of each partner was taken at £600. The testatrix and the others were carrying on the school in partnership when she made her will, and there may have been an understanding that the share of each was to be taken as worth £600 (3).

O'CONNOR M.R.:—

The testatrix left to Miss Anna Jane Williams her share in the school in the following terms:—"To Anna Williams of the French School, Bray, I give and bequeath my share of furniture and goodwill in the French School which amount to £600." Now anyone reading this bequest must come to the conclusion that the testatrix was jointly with other people interested in the

(1) L. R. 5 Eq. 555.
(2) 22 Ch. D. 622.
(3) Cf. *Re Wood*, [1894] 2 Ch. 577; Abraham on Lunacy, pp. 330, 331; Theobald on Wills, 7th ed., p. 167. [REP.]

business of carrying on the school, and that one of the terms of the agreement between them was, that if for any cause the joint venture should terminate the share of the testatrix should be deemed to be of the value of £600. This certainly was the condition of affairs at the time the will was made, and shortly after, viz., on the 21st March, 1892, a formal deed of partnership was executed by the testatrix and her partners, and by this deed it was provided that upon the death of a partner, or on the withdrawal of a partner as thereinafter provided, the surviving or continuing partners or partner should be entitled to take over her share at the value of £600; and it was also provided that if at any time after the expiration of five years from the 1st July, 1891, anyone should be desirous of withdrawing, she should be entitled to receive £600. The deed further provided that, if at any time during the period of fifteen years (the full term of the partnership), it should appear to the partners, or to the majority of them, that the partnership could not any longer be successfully carried on, and that circumstances had arisen to interfere with the successful working of the same, it should be lawful for any two of the partners by notice to the other to determine the partnership, and that the partner on whom notice should be served should be entitled to receive £600 for her share, or to have the value ascertained by a valuation as therein mentioned.

Now I cannot think that the execution of this deed subsequently to the execution of the will, or anything done in pursuance of it, could by itself operate as an ademption of the specific bequest of the share in the partnership, because the deed only put into formal and precise language an agreement, which was in substance in existence at the date of the will, by which it is obvious the testatrix wished to give her share either in specie or in money value. The real subject-matter of the bequest remains, notwithstanding the execution of the deed.

The testatrix unhappily became a lunatic, and was so found within five years from the date of the deed, and under an order of the Lord Chancellor, also made within the five years, the other partners brought into Court the sum of £600 for her share, and that sum was invested in the sum of £556 10s. 3*d.* Consols, which sum still remains in Court, and is easily identified.

M. R.
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Now if the testatrix had not become a lunatic, but had retired from the partnership owing to ill health, and had taken the sum of £600, and invested it in securities which could be ear-marked, I do not think that there would have been an ademption, because what she really bequeathed was the amount of her share, valuing it at £600, meaning thereby that the legatee was to get £600, the proceeds of her share of the partnership. I do not think that the situation is changed by what was done in the lunacy matter, because the very thing which was bequeathed, viz., £600, was called into existence by the order of the Lord Chancellor. Accordingly, I hold that Miss Anna Jane Williams is entitled to the sum of £556 10s. 3*d.* Consols, which represents the sum of £600, and to the dividends thereon, from the date of the death of the testatrix. The costs will come out of the residue.

Solicitors for the plaintiffs: *White & White.*
Solicitor for the defendant Williams: *T. Duggan.*
Solicitor for the Attorney-General: *M. J. O'Connor.*

W. L.

IN RE FAYLE AND THE IRISH FEATHER COMPANY'S CONTRACT.

M. R.
1917.
Oct. 30.
Nov. 9.

(1917. No. 695.)

Vendor and purchaser—Title—Defect in conveyance of real estate—Omission of the word "heirs" in habendum—Intention.

Premises held under a fee-farm grant were conveyed by way of mortgage to a firm of three solicitors, carrying on business under the name of M. & Co. The premises were granted to "M. and Co., their heirs, successors, and assigns, to hold unto, and to the use of M. & Co., their successors and assigns." M. & Co., under the statutory power of sale, sold the premises to the predecessors in title of the vendor.

The purchaser objected to the title on the ground that by reason of the absence from the habendum of the words "heirs" the conveyance did not pass the fee, but at most an estate for the joint lives of the members of the firm of M. & Co. and the survivors and survivor of them.

Held, that the intention of the conveyance was to give the whole estate to the mortgagees, and that it passed in fee.

SUMMONS under the Vendor and Purchaser Act, 1874.

This was an application by Elizabeth Fayle, the vendor, for an order that an objection, that a conveyance by way of mortgage, dated August 27th, 1887, whereby the freehold hereditaments known as 54 Poolbeg Street, in the city of Dublin (purchased from the vendor by the Irish Feather Co., Ltd.), were granted to the grantees, their heirs, and successors, and assigns to hold to the use of the grantees, their successors, and assigns, gave the grantees an estate for life only, was not maintainable.

The following statement of the facts is taken from the judgment of O'Connor M.R.:—

This is a question between vendor and purchaser, and arises out of a conveyance through which the vendor's title is derived. The lands, the subject-matter of the contract for sale, are held under a fee-farm grant to James Macken, his heirs, and assigns. He mortgaged them in fee-farm to James Goff. By a subsequent mortgage, in which the mortgagor and mortgagee joined, the lands were mortgaged to a firm of solicitors, Messrs. Meldon & Co., who, acting under the powers conferred on mortgagees by the

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Conveyancing Act, put up the lands for sale, and sold and conveyed them to a predecessor in title of the vendor.

The objection of the purchaser is, that the conveyance to the mortgagees who sold is defective, in that it was not in proper form, and did not give them the fee-farm estate, but at most only an estate for the joint lives of the members of the firm of Meldon & Co., and the survivors and survivor of them. The mortgage is dated the 27th August, 1887, and made between James Macken, the mortgagor, of the first part; James Goff, a mortgagee, of the second part; and John J. Meldon, James F. Meldon, and Louis S. Meldon, described as carrying on business as solicitors as Meldon & Co., of the third part. It recites the title of the mortgagor as owner in fee-farm of the lands; it recites that the mortgagor had incurred certain liabilities, including money secured to James Goff by a mortgage of the lands, and that Meldon & Co. had agreed to advance the moneys required to pay off these liabilities, other than the liability to James Goff, on being secured their advances, and certain costs, in the manner thereinafter appearing, and that Goff should join in postponing his mortgage. The mortgagor gave the usual mortgagor's covenant for payment, and then came the conveyance in the following manner: The mortgagor as beneficial owner, and James Goff as mortgagee, granted to Messrs. Meldon & Co. (so describing the grantees), their heirs, successors, and assigns the mortgaged lands to hold the premises unto and to the use of Meldon & Co., their successors, and assigns. Then came a proviso for redemption, under which on payment of the liability to Meldon & Co., they should reconvey the premises to James Goff, his heirs, and assigns.

For the purpose of the question which has arisen, these are the only material parts of the mortgage.

Leet, for the vendor:—

The purchaser's objection is untenable on two grounds, first, the habendum (apart from the declaration of use) is repugnant to the premises, and should, therefore, be rejected: *Auditor King's Case*, cited in *The Earl of Rutland's Case* (1), and referred to in Norton on Deeds, p. 295; secondly, though the express

(1) 8 Co. Rep. 55*a*, at p. 56*b*.

use declared in the habendum does not exhaust the grantor's estate, it does not follow that there is in all cases a resulting use to him: Sanders on Uses, 5th ed., p. 103. The proposition to that effect in Norton on Deeds, p. 374, needs qualification. The Statute of Uses is founded on equitable principles, and its main design, as adumbrated in Sanders, was to give parliamentary sanction to the practice of the Court of Chancery, and to render the intervention of that Court unnecessary, by clothing the use with the legal estate, whether that use was express or implied. If and so far as the use is implied, the question of the position of the legal estate is one of intention only, for implication and intention are one and the same. In the present case the whole tenor of the deed shows that the intention of the parties was that the grantee should take the entire legal estate vested in Goff, the prior mortgagee. It would be absurd to suppose that Goff joined in the deed to postpone an estate in fee-farm to one for life only. The proviso for redemption also supports that view, and the word "successors" in the habendum, though it is not a word of limitation, is an indication of the same intention. The tendency of the Courts is now to construe equitable limitations according to the intention of the parties appearing on the deed: *In re Tringham's Trusts*, *Tringham* v. *Greenhill* (1); *Rodgers* v. *Houston* (2). A resulting use must be ascertained in the like manner.

Hugh Kennedy, for the purchasers:—

If there were no use declared by this deed, I should admit that the grantees took in fee-simple, on the principle that the habendum will not be allowed to abridge the estate given by the premises; but where, as here, uses are declared for a less estate than the estate granted by the common law conveyance, the grantee can take only an estate to the extent of the use executed in his favour by the Statute of Uses, and there is a resulting use to the grantor of so much of the estate as the uses do not dispose of effectually. If the opinion expressed in the passage cited from Sanders on Uses bears the meaning attributed to it, then it does not state the doctrine as now accepted. The accepted modern view is that stated in Norton on Deeds, at page 374. I submit that the passage from Sanders

(1) [1904] 2 Ch. 487. (2) [1909] 1 I. R. 319.

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does not bear the meaning suggested, and that the illustration given confirms this. Words of limitation, therefore, are not to be supplied by inferences as to the intention: *In re Irwin* (1); *In re Ethel and Mitchell's Contract* (2); *In re Ford and Ferguson's Contract* (3); and see the judgment of Sargant J. in *Monckton's Settlement* (4). There have been two clear currents of authority, the one exemplified by the cases just referred to; the other the class of case exemplified by *In re Tringham's Trusts* (5), namely, cases of equitable limitation, in which it is established that the intention will prevail notwithstanding the omission of words of limitation. If intention is to be looked to in the present case, then I submit that the use of the word "successors" shows an intention that the estate granted is to last only so long as the business association or firm of the three Messrs. Meldon continues, and no longer. He also referred to Norton on Deeds, pp. 291, 363, 364.

Nov. 9.

O'CONNOR M.R., having stated the facts as above given, proceeded as follows:—

The objection of the purchaser is that the mortgagees did not get a valid estate in fee-farm, and that the vendor, who claims under a conveyance from them, has not a good title to such estate. The purchaser says that, because the habendum limited the uses to Meldon & Co., their successors and assigns without the introduction of the word "heirs," they only took an estate for their joint lives and the lives and life of the survivors and survivor of the persons constituting the firm, that this limitation exhausted the uses, and, subject thereto, the use of the estate in fee resulted to the mortgagee, James Goff, in fee-farm, and, subject to his mortgage, to Macken. This brings us back to the early history of conveyancing. Before the Statute of Uses the proper form of a conveyance in fee-simple was a grant to the grantee and his heirs. This was sufficient to give the legal estate in fee, but if, by reason of the absence of consideration, or any other circumstance which afforded evidence that the grantor, though he conveyed the legal estate, did not intend to part with his beneficial interest in

(1) [1904] 2 Ch. 752.
(2) [1901] 1 Ch. 945.
(3) [1906] 1 I. R. 607.
(4) [1913] 2 Ch. 636.
(5) [1904] 2 Ch. 487.

the lands, the Court of Chancery, binding the conscience of the grantee, declared that he held the lands upon trust for the grantor and his heirs, and that, although the grantee held the legal estate, the use thereof remained with the grantor. Then came the Statute of Uses, which enacted that the persons to whose use the land was conveyed should also have the legal estate. The Act did not touch the jurisdiction of the Court of Chancery, and it still remained in the power of that Court, when no use was declared, and when it ought to be inferred, from the absence of consideration or otherwise, that it was not the intention of the grantor to part with the use, to give back the use to the grantor. There was what was called a resulting use, and, as under the Statute of Uses the legal estate followed the use, the effect was to bring it back to the grantor. This is all elementary law. From this statement it appears that the resulting use depends for its operation on intention, because the interference of the Court of Chancery was caused by a desire to prevent unconscionable reliance on strictly legal rights.

I was referred by Mr. Leet, counsel for the vendor, in his very clear exposition of the law, to a text-book of undoubted authority—Sanders on Uses. At p. 102 (5th ed.) the learned author there says:—"It is the intention of the parties, to be collected from the face of the deed, that gives effect to resulting uses. Therefore, it has been said, that the payment of 5*s.* or the like, serves as an implied declaration of the use to the feoffee, when it is not otherwise expressly disposed of. On the contrary, the want both of consideration and declaration shews that the feoffor never intended to part with the use. This has been the construction, when no part of the use has been expressly limited. But the same rule does not hold, as I have already stated, when any part of the use is limited from the feoffor, etc., and the residue left undisposed of; for the express declaration in this case is presumptive proof, that he did not mean, that the grantee should have the remainder of the use. Therefore if an estate be granted even for a valuable consideration to feoffees and their heirs, to the use of them for their lives, it should seem that the remainder of the use will result to the grantor; for the extent of the express limitation is the measure of consideration. But when in a conveyance to a purchaser, the contract is recited to be for the purchase of the absolute fee simple, the consideration extends to the entire use; so that I

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conceive, there can, in that case, be no resulting use to the grantor or vendor. The payment of the consideration money divests him of any beneficial interest, which constituted the use before the statute; and if any part of the use were to remain unlimited, it would vest, as it should seem, in the purchaser upon the principle of modern trusts, resulting or arising by implication."

It is plain from this that a resulting use depends upon intention, that intention to be affirmed or negatived by the conveyance. Now what was the intention of the conveyance in the present case? Clearly to give to the mortgagees the whole estate which was vested in the mortgagor and the mortgagee who postponed his mortgage. The conveyance was in the first instance to the mortgagees and their heirs—words sufficient by themselves to convey the fee. No doubt the use limited by the habendum did not exhaust the fee, but I cannot hold that the fee resulted, because that would be contrary to the manifest intention of the deed. The passage from Sanders shows that the intention that the fee should result may be gathered from the limitation by way of use of a particular estate only, but that is only an indication of intention, which may be disproved by other circumstances, as I think it is amply disproved in the present case.

I may refer to another text-book of high authority, Preston on Conveyancing. At p. 194, vol. i, 3rd edition, this passage is to be found in the chapter on Recovery Deeds:—"To the clause prescribing the mode of suffering the recovery, there is generally added a declaration of the uses of the recovery. This declaration should be in the form in the appendix, or to that effect, mutatis mutandis. It seldom happens that a declaration of this nature is omitted. When omitted, the use will result, unless from the consideration paid by the demandant, or from some other circumstance, the beneficial ownership is evidently to remain with him." Here again we have authority that the resulting use depends on intention. I must hold that the conveyance passed the fee, and that the objection of the purchaser should be overruled.

The conveyance, however, is of a very irregular character, and the point was a fair one. I give no costs.

Solicitors for the vendor: *A. & L. Goodbody.*

Solicitor for the purchaser: *Thomas Montgomery.*

W. L.

IN RE WHITE, DECEASED.
INGRAM *v.* WHITE.

(1917. No. 534.)

Barton J.
1917.
July 2.
Nov. 1.

Practice — Jurisdiction — Foreign infant — Foreign guardian — Trust — Remuneration of trustees for collection of income and acting as solicitors — Costs — Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *ss.* 42, 43.

A and B, the trustees of a will, were solicitors, and became trustees on getting a covenant for remuneration from the tenant for life. The property devolved on an infant tenant in tail, an American citizen, of whose property an American corporation was appointed guardian by a competent American Court. On proof that the receipt of the corporation was a good discharge for all income of the infant, and that the corporation had full discretionary power to apply the income for his benefit, the judge made an order allowing A and B to pay arrears and all accruing income to the corporation, and also authorized them to enter into an agreement with the corporation fixing the remuneration for their services.

SUMMONS.

By the will, dated the 27th August, 1880, of Barnewall Peter White, of Londonderry, who died on the 3rd December, 1885, an estate, called the Tamlaght Estate, in the county of Londonderry, was assured to the use of Richard White for life, and after his decease to the use of Thomas Earl White for life, with remainder to the use of the first and other sons of Thomas Earl White successively in tail male, with remainders over; and the trustees of the will were given a power of sale over the Tamlaght Estate, by virtue of which they were trustees of the settlement created by the will for the purpose of the Settled Land Acts, 1882 to 1890, and of sect. 42 of the Conveyancing Act, 1881. The will contained no provision for the remuneration of the trustees. The plaintiffs, who were solicitors and land agents, had agreed, at the request of Richard White and Thomas Earl White, to become trustees of the will on the terms that they should be remunerated in the same manner as if they had not been trustees, and they were accordingly appointed trustees by a deed of the 24th January, 1903, containing covenants by

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Richard White and Thomas Earl White securing them such remuneration.

Richard White died in the year 1905, and after his death the greater part of the Tamlaght Estate was sold by Thomas Earl White as tenant for life, and the capital moneys arising on the sale were invested in the names of the plaintiffs in sundry stocks and securities of large value. The plaintiffs were also in receipt of the rents of the portions of the estate remaining unsold.

Thomas Earl White died on the 7th October, 1916, at Philadelphia, in the United States, where he had lived for many years, and practised as a lawyer, leaving the defendant, his only son, an infant of the age of about eighteen years. Evidence was given by an affidavit of Joseph H. Taulane, a practising attorney of experience at the Philadelphia Bar, that, by a decree of the Orphans' Court of Philadelphia County, dated the 20th October, 1916, the Fidelity Trust Company of Philadelphia was, on the petition of the defendant, appointed guardian of his estate, with the assent of his mother, with whom he resided. It was further proved by this affidavit that this appointment was regularly made by the Orphans' Court, the jurisdiction of which embraced the appointment, control, and discharge of the guardians of minors, and the settlement of their accounts. It was also shown that a Corporation could legally be appointed guardian, and that the Trust Company had by its constitution power to execute trusts of all kinds, and to act as guardian, and to give receipts for all the personal property, income, and rents of the defendant, and that it would be the duty of such a guardian, and that such guardian had full discretionary authority to make a proper allowance out of the income for the maintenance, education, and benefit of the defendant, but not to expend any of his capital without an order of the Court. A printed copy of the charter of the Trust Company was annexed to Mr. Taulane's affidavit by way of exhibit. It also appeared from the evidence in the case that the defendant was an American subject, and that under the will of his father, the said Thomas Earl White, he was entitled in reversion expectant on the death of his mother to considerable real and personal property, and that by the local law trustees were entitled to reasonable remuneration for their services.

The summons asked that the plaintiffs should be at liberty to pay to the Trust company as guardian of the estate of the defendant the moneys in their hands, representing accrued income, and also, until further order, the income thereafter to accrue from the lands and capital moneys, without seeing to the application of such income, and that the plaintiffs shall be appointed receivers of the income at such remuneration as might be fixed by the Court, or alternatively, that they should be at liberty to enter into an agreement with the Trust company, subject to the approval of the Court, fixing the remuneration for their services in and about the collection and distribution of the income.

Longfield, for the plaintiffs:—

It would be difficult for the plaintiffs to obtain satisfactory materials on which they could fairly exercise any discretion as to the application of the income. Therefore they are entitled to be relieved, by being authorized to pay the entire income to the guardian, which has been regularly appointed by the Orphans' Court. If the funds were in Court the payment could not be claimed by the guardian as of right: *Re Chatard's Settlement* (1); but the evidence shows that the guardian is bound to apply the income for the benefit of the infant. The acts of a regular tribunal of a foreign friendly state should be recognized: *Nugent* v. *Vetzera* (2); *Re De Linden* (3). See also *Re Brown's Trust* (4) (a case very meagrely reported), and sects. 42, 43 of the Conveyancing Act of 1881.

As regards the plaintiffs' remuneration, they originally accepted the trust on the basis of receiving remuneration; and as it is for the benefit of the infant that they should continue to collect and deal with the income as proposed, and act as solicitors to the trust in Ireland, the Court will fix a proper remuneration for their services: *Marshall* v. *Holloway* (5); *Brocksopp* v. *Barnes* (6); *Bainbrigge* v. *Blair* (7); *Re Freeman's Settlement Trusts* (8).

(1) [1899] 1 Ch. 712.
(2) L. R. 2 Eq. 704.
(3) [1897] 1 Ch. 453.
(4) [1865] 12 L. T. 488.
(5) 2 Swanst. 432, 453.
(6) 5 Madd. 90.
(7) 8 Beav. 588.
(8) 37 Ch. Div. 148.

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Gerald Dougherty, for the infant defendant, supported the application.

Barton J. made an order, the material parts of which are as follows :—

It is ordered that the applicants be and they are hereby at liberty, without seeing to the application thereof, to pay to the Fidelity Trust Company of Philadelphia as guardian of the estate of the above-named defendant appointed by the Orphans' Court of Philadelphia, any money in the hands of the applicants representing the net accrued income to which the defendant is entitled under the will in the title hereof mentioned from the hereditaments known as the Tamlaght estate, in the County of Londonderry, so far as the same remains unsold, and from the capital moneys representing the portions of the said estate which have been sold, and be further at liberty until further order and without seeing to the application thereof to pay to the said Fidelity Trust Company of Philadelphia, as such guardian as aforesaid, the net income which shall from time to time hereafter accrue to the defendant from the said hereditaments and capital moneys, and be further at liberty to enter into an agreement, subject to the approval of this Court, with the said Fidelity Trust Company of Philadelphia, as such guardian as aforesaid, fixing the remuneration to be allowed to the applicants for their services in and about the collection and disbursement of the said income.

The draft of an agreement between the Fidelity Trust Company of Philadelphia and the plaintiffs, providing for the plaintiffs' remuneration by a commission on the income, and costs in matters not covered by the commission (which were the terms on which they had theretofore been remunerated) having been submitted to the judge on a subsequent day, with an affidavit by an independent solicitor that the terms were those usual in cases in which solicitors and land agents were appointed trustees, the following Order was made :—

It is ordered that the draft agreement proposed to be made between the Fidelity Trust Company, of the City of Philadelphia, and the plaintiffs, fixing the plaintiffs' remuneration for services in and about the administration of the trust estate of the defendant and the income thereof, be and the same is hereby approved, subject to the condition that the costs referred to in the said agreement shall be taxed as between solicitor and client from time to time prior to payment or retainer thereof, and that the plaintiffs be and they are hereby at liberty to execute an engrossment in the terms of the said draft subject as aforesaid.

Solicitors for the plaintiffs : *French & French.*

Solicitors for the defendant : *Todd & Mark.*

R. W. I.

GUIRY *v.* CONDON.

Barton J.
1917.
July 24, 25.

Will—Ademption—Bequest of chattel real—Agreement for sale prior to bequest—Sale completed after testator's death—Purchase-money paid to executors—Legacies how payable—Residuary Gift—Debts and testamentary expenses.

After certain pecuniary legacies and bequests of chattels a testator provided as follows:—"Subject to the foregoing I will devise and bequeath my lands of T. unto J. . . . and I direct that he shall pay thereout the foregoing legacies and obligations and in case the said J. is not willing to accept this devise and bequest I direct that all my lands cattle goods and chattels be sold by public auction and that the foregoing legacies obligations and bequests be paid and discharged thereout and that the residue of my estate be paid to C."

The testator, at the date of his death, was possessed of certain lands of T., held under a statutory tenancy. At the date of the execution of his will he had entered into an agreement for sale of other lands of T., also held under a statutory tenancy, and after his death the sale was completed, and the purchase-money (a sum of £650) was paid to his executors.

Held, 1. That the sum of £650 was undisposed of by the will, and passed as on intestacy to the next-of-kin.

2. That the residuary bequest in favour of C. was contingent on an event which had not happened, and that it failed.

3. That the debts and testamentary expenses were payable primarily out of the undisposed of residuary estate.

4. That the legacies were primarily payable out of the property bequeathed to J.

ORIGINATING SUMMONS.

By his will, dated the 6th June, 1914, Maurice Condon of Tiermena, in the county of Limerick, directed that certain legacies (including a legacy of £50 to his housekeeper, Mary Ryan, with bed and bedding, donkey-car and tackling, and fowl), as well as his debts and testamentary expenses, "shall be paid out of my estate."

After setting out the legacies therein bequeathed the will proceeded as follows:—"Subject to the foregoing I will devise and bequeath my lands of Tiermena with all the cattle goods

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and chattels thereon save as aforesaid unto Joseph Mulcahy son of the late William Mulcahy of Bridge Street Newcastle West and nephew of my late wife and I direct that he shall pay thereout the foregoing legacies and obligations as soon as possible after my death and in case the said Joseph Mulcahy is not willing to accept this devise and bequest I direct that all my lands cattle goods and chattels be sold by public auction and that the foregoing legacies obligations and bequests be paid and discharged thereout and that the residue of my estate be paid unto Mrs. David Condon wife of my said brother David Condon of Chicago."

Testator died on the 3rd day of August, 1914, and probate of his will was granted to the plaintiffs, the executors therein named.

Testator died possessed of certain lands of Tiermena, containing forty-two acres and six perches, held for a statutory term, at the yearly rent of £30 4*s*. At the date of the execution of his will he had entered into a contract for sale of another part of the lands of Tiermena, also held under a statutory tenancy. The sale was not completed at the date of his death, but it was subsequently completed by the executors, and the sum of £650 purchase-money was paid to them in respect of the sale, and lodged on deposit receipt in the Munster and Leinster Bank, Rathmines. The defendant, Joseph Mulcahy, accepted the devise and bequest of the lands of Tiermena, with the cattle, goods, and chattels thereon, as set forth in the will. The defendant, Kate Condon, was the wife of Mr. David Condon, of Chicago, mentioned in testator's will. The defendant, Thomas Condon, was appointed by the judge to represent the other next-of-kin of testator.

On the 26th June, 1917, a summons was issued by the plaintiffs for the determination of the following questions and matters:—

1. Whether, in the event that has happened, namely, of Joseph Mulcahy having accepted the bequest of the lands of Tiermena, with the cattle, goods, and chattels thereon, a sum of £650, forming portion of the personal estate of the testator, passed to the defendant, Kate Condon, under the bequest of "the residue

of my estate," contained in the testator's will, or otherwise passed under the said will, or whether there is an intestacy as to the said sum?

2. Who is now entitled to the said sum of £650?

3. Whether the said sum of £650 ought to bear, and what proportion, of the debts, funeral and testamentary expenses of the deceased, and of the legacies bequeathed by his will.

R. F. Holmes, for the plaintiffs.

William A. Ryan, for Joseph Mulcahy:—

The gift of the lands of Tiermena, mentioned in the will, includes the unsold land, as the contract for sale was made prior to the will: *Steele* v. *Steele* (1). The testator intended to dispose of all his property as is shown by the gift of the residue. If the proceeds of the sale go to Joseph Mulcahy, the whole property is disposed of, and there is no intestacy. The Court leans against a construction which will create an intestacy as to any part of testator's property, when another construction of the will would dispose of the whole. At the date of the making of the will the testator knew that he had entered into a contract of sale, and when he demised and bequeathed the lands of Tiermena, his intention was to dispose of his whole interest in the lands, whether sold or unsold. The agreement for sale was made on the 26th March, 1914, the will is dated 6th June, 1914, and the testator died on 3rd August, 1914. Probate was granted on the 5th September, 1914, and the purchase-money was not paid until a subsequent date, so that it was very doubtful when the testator made his will whether the sale of the portion of the land would be completed. Testator must have clearly understood what property he had, and who had claims upon him when he made his will; this is shown by the bequests of the various legacies, including a bequest of £5, and other small sums. When he took so much trouble to distribute his property in such small amounts, he must have intended to dispose of the whole of it, and it cannot be presumed that he omitted his largest asset.

(1) [1913] 1 I. R. 292.

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A. F. Blood K.C., for Kate Condon :—

Joseph Mulcahy has accepted the bequest of the farm, but the gift of the residue to Kate Condon is not contingent on the happening of the event which did not take place, viz., refusal by him to take the farm. The word "estate," when used in a will is genus generalissimum, comprising real and personal property: *Mayor of Hamilton* v. *Hodson* (1). There is a presumption against intestacy as to any part of the property; and "estate" will have its full meaning given to it, unless its meaning is clearly restricted by the context: Jarman on Wills, p. 991; *Loftus* v. *Stoney* (2); *Atree* v. *Atree* (3). If this were a simple gift of residue standing alone, it would comprise everything. It is a general gift of the general residue of the estate; and everything that becomes payable falls into the general residue, including the £650 payable under the terms of the contract for sale. As to the argument that the gift of residue was contingent on an event which did not take place, I rely on *Re Meredith's Trusts* (4), where the event on which a sum of £1,200 was to fall into the residue of a trust estate did not happen; but it was, nevertheless, decided that the £1,200 was not undisposed of, but was well appointed by a residuary gift. The argument of Sir H. Jackson, at p. 760, was that the will declared that the falling into the residue of the £1,200 was to be contingent on a particular event which had not happened; but Bacon V.-C. held otherwise: *Jull* v. *Jacobs* (5) only shows that the general principle of construction to be adopted can be controlled by the context of the will and the particular circumstances of the case.

P. Kelly, for Thomas Condon, representing the next-of-kin of the testator other than the defendant Kate Condon :—

The sum of £650 representing the purchase-money of the sold part of Tiermena is not disposed of, and my clients are entitled.

(1) 6 Moo. P.C. Rep. 76.
(2) 17 Ir. Ch. 178.
(3) L. R. 11 Eq. 280.
(4) 3 Ch. Div. 757.
(5) Ib. 703.

What did the testator mean by the expressions "my lands of Tiermena" and "my estate"? What does "all my lands" include? We submit that on the words of the will what was left, if Joseph Mulcahy refused to accept, was the unsold part of the farm which he describes as "my lands of Tiermena." The language is plain. There is no need to refer to cases. The sold portion was not at the date of the will testator's lands at all. He held them in trust for the purchaser. *Steele* v. *Steele* (1) has reference to a different state of things altogether. The question there was whether there was conversion or not. There is here no question of conversion, and no question arises between the real and personal representative. See also *Steele* v. *Steele* (No. 2) (2) as to question of intention and construction of the will. Here the words of the will itself show that "my lands of Tiermena" did not include the lands already sold—the lands which were contracted to be sold before the execution of the will. The bequest to Mulcahy can only mean the lands which were not sold. "My estate" in this connexion has the same meaning as "estate" at the commencement of the will.

There is a condition precedent to Mr. Blood's client taking at all. It has not happened; but he contends that his client is residuary legatee in any event, whether Joseph Mulcahy elects to take or not. But why then associate the gift of the residuary estate with the condition of Joseph Mulcahy taking or not? The language cannot possibly bear the construction he contends for. If that construction is impossible, if the testator meant to benefit Kate Condon in any event, why did he not simply appoint her residuary legatee? Joseph Mulcahy is bound to pay the debts and funeral and testamentary expenses, in addition to the legacies. It is the case of a particular person having to pay these liabilities because he gets a specific devise or bequest of a particular part of the estate. The gift of the farm to him is saddled with the payment of the legacies: *Re Grainger Dawson* v. *Higgins* (3), reported as *Higgins* v. *Dawson* (4) in the House of Lords; Halsbury, Laws of England, vol. xiv (672), p. 290.

(1) [1913] 1 I. R. 292.
(2) [1915] 1 I. R. 20.
(3) [1900] 2 Ch. 756.
(2) [1902] Ap. Cas. 1.

Barton J.
1917.
GUIRY
v.
CONDON.
July 25.

BARTON J. :—

In this obscure will one thing is clear: the testator intended to throw a burden on the specific devise to Joseph Mulcahy of "lands of Tiermena with all the cattle goods and chattels thereon save as aforesaid." "Save as aforesaid" refers, I think, to the bed, bedding, donkey-cart, and fowl left to his housekeeper, Mary Ryan. This specific bequest is made "subject to the foregoing," and is followed by this direction:—"I direct that he shall pay thereout the foregoing legacies and obligations as soon as possible after my death." Mulcahy is not intended to take that specific devise and bequest without being obliged to give effect to this direction. This is made more evident by what follows:—"And in case the said Joseph Mulcahy is not willing to accept this devise and bequest I direct that all my lands cattle goods and chattels be sold by public auction and that the foregoing legacies obligations and bequests be paid and discharged thereout"; and he then proceeded to deal with the residue. The testator obviously intended Joseph Mulcahy to be liable to pay the debts and legacies. Whether, and if so how far, he is primarily liable for debts and legacies, I shall deal with later on.

The next question arises on the words—"and that the residue of my estate be paid unto the aforesaid Mrs. David Condon wife of my said brother David Condon of Chicago." Are those words governed by the words "in case the said Joseph Mulcahy is not willing to accept this devise and bequest"? In my opinion these words govern the whole sentence; and as Joseph Mulcahy has accepted the devise and bequest, the residuary devise and bequest falls to the ground. Mr. Blood K.C. referred to *In re Meredith's Trusts* (1). That was a case of an appointment of residue under a power, and the judgment does not throw much light upon the question which I have to decide. I cannot get away from the grammatical form of the sentence. I hold that this residuary devise and bequest is contingent on an event which has not happened.

The next question is, whether the purchase-money of the lands of Tiermena, which had been agreed to be sold by a parol agreement

(1) 3 Ch. Div. 757.

of sale, passed under the devise and bequest of "my lands of Tiermena." I think not. They had ceased to be the testator's lands of Tiermena. He was merely a trustee of them for the purchaser. Perhaps he did not realize this. Perhaps he intended to dispose of the purchase-money himself. I cannot usefully embark on such speculation. All I can say is that they were not at the date of the will or death included in "my lands of Tiermena." In other words, they were undisposed of, and pass as on an intestacy. The remaining question is, whether the debts, testamentary expenses, and legacies fall upon the undisposed of fund or upon the specifically devised property upon which they are thrown by the will. Upon that point I think that I must hold, following *Walker* v. *M'Kay* (1), that the debts and testamentary expenses fall primarily upon the undisposed of residue. That view does not depart from the testator's expressed intention.

Accordingly, I answer the questions—1, there is an intestacy as to said sum; 2, the next-of-kin of the said testator; 3, the said sum ought to bear primarily the debts and testamentary expenses of the deceased, but not the legacies.

Solicitor for the executors: *P. Liston.*
Solicitors for Joseph Mulcahy: *Horan & Devine.*
Solicitor for Kate Condon: *P. J. Gaynor.*
Solicitor for Thomas Condon: *Robert Cussen.*

R. W. L.

(1) [1917] 1 I. R. 278.

Wylie J.
1917.
Dec. 11

IN THE MATTER OF THE ESTATE OF GODWIN YOUNG.

Land Purchase Acts—Practice—Claim under bank mortgage affecting purchase-money—Interest accrued since last half-yearly rest—Deduction of Income Tax—"Yearly interest"—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *sect.* 102—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *sect.* 40.

Where a claim is vouched under an ordinary bank mortgage, affecting the purchase-money of lands sold under the Land Purchase Acts, for principal and interest accrued since the last half-yearly rest, income tax will not be deducted from such interest, even after the death of the vendor who created the mortgage.

QUESTION arising on the ruling of the final schedule of incumbrances affecting the purchase-money of the lands sold herein under the Land Purchase Acts.

Appearing on the final schedule was a claim by the Provincial Bank in respect of a mortgage, dated the 21st day of April, 1911, whereby the vendor granted to the bank the lands sold in this matter and the purchase-moneys thereof, and the bonus payable in respect of the said purchase-moneys, to secure all sums then due or thereafter to become due by the vendor to the bank, and whereby the vendor covenanted with the bank that he would on demand pay to the bank all sums then due or thereafter to become due by him to the bank, with interest for the same in the meantime, until payment at the bank's current rate, and calculated according to the custom of bankers; and it was thereby (inter alia) declared that nothing therein contained was to be deemed or taken in any manner to affect the right of the bank at any time to sue for or otherwise to proceed against the vendor on foot of the moneys due to the bank.

The vendor has since died, and the proceedings for sale were carried on in the names of his personal representatives.

The bank had vouched their claim on foot of the said security for £5,151 0*s.* 5*d.* for principal and £149 5*s.* 9*d.* for interest, being at the rate of £6 per cent. per annum from the 1st day of July, 1917, the date of the last half-yearly rest, to the 1st day of December, 1917. The examiner had vouched the claim, but had deducted income tax from the interest.

H. D. Conner K.C., for the personal representatives of the vendor:—

Income tax has properly been deducted. This is an ordinary mortgage security, and the bank have proved their claim for principal and interest under it as such. The principal sum proved for represents the amount due to the bank on the vendor's account up to the last half-yearly rest. The only interest in respect of which the question arises is that which has since accrued. It is "yearly interest" within the meaning of sect. 102 of the Income Tax Act, 1842, and sect. 40 of the Income Tax Act, 1853, and income tax must accordingly be deducted: *Moss* v. *Salt* (1); see also *Garston Overseers* v. *Carlisle* (2), a decision on sect. 105 of the Income Tax Act, 1842. The manner and time of payment of interest are immaterial: *Davies* v. *Craven* (3). If the mortgagor, in the case of a bank mortgage, is not entitled to deduct income tax from the interest he pays, he is in a worse position than any mortgagor, because he has to pay income tax assessed on his property, and cannot make any deduction from his mortgage interest.

E. J. Phelps, for the Provincial Bank:—

This is not a case of an ordinary mortgage. The moneys secured are payable on demand, and the interest is payable according to the custom of bankers, i.e., it is to be capitalized. Further, the bank has a right to call in at any time the money due on the current account.

[WYLIE J: Is not the amount due on the mortgage an ascertained sum as from the death of the customer?]

In *In re Persse's Estate* (4) and in *Crawford* v.

(1) 32 Beav. 269. (2) [1915] 3 K. B. D. 381. (3) [1907] 2 Ch. 448.

(4) 17th December, 1888 (unreported). In the Land Judge's Court. *In re Estate of Burton Walter Persse, Owner and Petitioner.* The claim of the Provincial Bank was in respect of an ordinary overdraft granted to the former owner of the estate ordered to be sold in the matter, and which was secured by him in the ordinary way, by a verbal deposit of the title-deeds of the estate. The examiner was of opinion that income tax should be deducted from the interest then payable on the bank's claim. *J. Joyce*, for the owner; *William Moore*, for the bank. Monroe J. ruled that interest at the rate of 6 per cent. per annum was payable on the bank's demand, and that income tax could not be deducted.

Wylie J. 1917. *In re* YOUNG'S ESTATE.

Kelly (1), which were cases of bank mortgages to secure moneys due on current accounts, the mortgagors had died; and in both cases, after argument, it was held that income tax could not be deducted from the interest proved for.

WYLIE J.: I cannot distinguish this case from the cases referred to. Without expressing any opinion on the point myself, I will follow them, and pay the interest vouched without deducting income tax.

Solicitors for the vendor: *Thomas Exham & Sons.*
Solicitor for the Provincial Bank: *John Tweedy.*

J. E. W.

(1) 6th November, 1908 (unreported). Before Barton J. *In re Estate of Peter Kelly, deceased*; *Crawford* v. *Kelly*. The real and personal estate of the deceased were being administered in Court, and the matter had been referred to Chambers to make the usual inquiries. The Provincial Bank proved their claim on foot of a mortgage to secure moneys for the time being due by the deceased to the bank. The mortgage provided that the moneys due to the bank were to be payable on demand; that the interest thereby secured was to be calculated at the bank's current rate and according to the custom of bankers; and that nothing therein contained was to be deemed or taken in any manner to affect the right of the bank at any time to sue for or otherwise to proceed against the deceased on foot of the moneys due to the bank. The chief clerk had allowed the bank's claim for principal and interest due on foot of the mortgage, but had calculated the interest less income tax. The bank applied that the chief clerk's certificate be varied by allowing their claim for interest without making any deduction for income tax. *Garrett Walker K.C.* for the bank. *Mr. O'Sullivan*, solicitor, for the plaintiff. Barton J. ordered that the chief clerk's certificate be amended by allowing the bank's claim with interest, without any deduction being made therefrom in respect of income tax.

IN THE MATTER OF THE LOCAL REGISTRATION OF TITLE (IRELAND) ACT, 1891, AND OF JOHN FITZMAURICE, A REGISTERED OWNER OF LAND. FOLIO 3995, CO. KERRY, AND OF AN APPLICATION BY TIMOTHY FITZMAURICE, A TRANSFEREE, TO BE REGISTERED AS OWNER OF SAID LANDS COMPRISED IN SAID FOLIO (1).

1917.

June 26.

Land Registry—Sale by personal representative—Land Registry Orders and Rules, 1910; *Order* 4, *rules* 4 *and* 5—*Full money consideration.*

J. F., a registered owner of land, died intestate, leaving M. F., his widow, and a number of children his next-of-kin him surviving. M. F. took out a grant of administration to the personal estate of J. F., and subsequently executed a deed of transfer of the registered lands to her eldest son, T. F., in consideration of a sum of money acknowledged as paid to M. F. by K. B. "by way of fortune on her marriage" with T. F., and in consideration of certain rights of residence and maintenance reserved by the deed. The deed was executed by M. F. as personal representative of the deceased owner, and as beneficial owner of every estate and interest in the lands to which she was entitled. Certain of the children also joined in the deed to testify their consent to the assignment, but others of them, who were either abroad or minors, were not parties. T. F. married K. B., and subsequently applied to be registered as transferee.

Held by the Court of Appeal, affirming the decision of Madden J., that the sale was not one by a personal representative for full money consideration within Order 4, rule 5, of the Rules of 1st September, 1910; that the Registrar of Titles was entitled to require the shares of all the next-of-kin to be accounted for, and to postpone the registration of the transfer until these rules were complied with.

This was an appeal by Timothy Fitzmaurice against an order of Madden J., dated the 14th May, 1917, affirming an order of the Registrar of Titles, dated the 18th August, 1916, and refusing the application of the appellant to be registered as transferee, under deed dated the 29th July, 1916, of certain registered lands.

John Fitzmaurice, father of the appellant, was on the 8th November, 1909, registered under the provisions of the Local Registration of Title (Ireland) Act, 1891, as owner in fee simple

(1) In the Court of Appeal, before THE LORD CHANCELLOR, and RONAN and MOLONY L.JJ.

Appeal. 1917.

In re FITZMAURICE'S ESTATE.

of lands in the Co. Kerry, subject to a purchase annuity payable to the Irish Land Commission, and subject to the rights or equities (if any) arising from the interest vested in the said John Fitzmaurice by fiat of the Irish Land Commission dated the 25th March, 1909, being deemed to be a graft on his previous interest in the land, or arising in any other manner from the existence of such previous interest. John Fitzmaurice died intestate on the 28th July, 1912, leaving his widow, Mary Fitzmaurice, and several children, including the appellant, him surviving, and on the 1st April, 1916, letters of administration of the personal estate of the said John Fitzmaurice were granted to the said Mary Fitzmaurice.

On the 29th February, 1916, the following deed was executed by the said Mary Fitzmaurice and by those of her children named in the deed. It was admitted that there were other next-of-kin of John Fitzmaurice, some of whom were in America, and some minors :—

LAND REGISTRY OF IRELAND.

FOLIO No. 3995. CO. OF KERRY. LANDS OF LEAGH.

Registered Owner—JOHN FITZMAURICE.

I, Mary Fitzmaurice of Leagh, Ballyduffe in the Co. of Kerry Widow as personal representative of the above-named registered owner and as Beneficial Owner of every estate right title or interest therein to which I am beneficially entitled and with the consent of my children Bridget Fitzmaurice Michael Fitzmaurice Mary Stack Norah Shanahan and Wm. Fitzmaurice testified by their executing these presents in consideration of the sum of £290 (of which the sum of £270 is paid in cash and balance is secured by promissory note) paid to me by Kate Boyle by way of fortune on her marriage with my son Timothy Fitzmaurice hereinafter called the Transferee receipt of which sum of £270 I hereby acknowledge and for the further considerations hereinafter appearing Do hereby transfer to the transferee the lands comprised in said folio To Hold the same to the transferee his heirs and assigns in fee simple Subject to and charged with the following that is to say

1. To pay Land Commission instalments.

2. To pay to me the sum of £20 balance of said purchase money and collaterally secured by promissory-note as aforesaid.

3. To permit and suffer me the said Mary Fitzmaurice and the said Bridget Fitzmaurice during our respective lives or in the case of the said Bridget

Fitzmaurice until she marries to occupy exclusively the bedroom in dwelling-house in said lands known as the upper room and to have the use of the kitchen fire and also the use of the donkey and donkey cart whenever I or she may require same.

4. To the support and maintenance of me the said Mary Fitzmaurice and the said Bridget Fitzmaurice during our respective lives or in the case of the said Bridget Fitzmaurice until she marries at the same table as the transferee and his family and in same manner as both of us have heretofore been supported and maintained or should any dispute occur between me and the transferee or his wife then subject to and charged with (in lieu of my said support and maintenance only) to payment to me during my life of an annuity of £10 payable quarterly the first quarter's payment to be of a proportionate part and to be paid at the end of three months from the date of such dispute. And further in case of such dispute and in addition to said annuity to supply me with one quart of new milk and one quart of sour milk each day and with sufficient turf to be cut saved dried and brought to the house for me. And I also have handed over to the said transferee 10 cows 2 heifers 1 horse horse cart and tackling 1 sow 12 bonhams all farming implements dairy utensils dead stock household furniture (except furniture in room hereinbefore reserved) and I admit same are now the proper goods and chattels of the transferee. And I the transferee do hereby consent to the registration of the aforesaid reservations as burdens affecting the said lands and hereby covenant with the said Mary Fitzmaurice to pay the Land Commission instalments and to pay observe fulfil and perform the different provisions hereinbefore contained in favour of the transferor and her daughter Bridget Fitzmaurice.

Dated this 29th day of February, 1916.

Timothy Fitzmaurice married Kate Doyle on the day the deed was executed, and subsequently, through his solicitor, made several applications to be registered as transferee of the lands, but the registering authority refused to register his title, pointing out that as the case was one of transmission on the death intestate of a registered owner, rule 4, sub-s. 1 and sub-s. 2, applied, and should be complied with, and that the shares of all next-of-kin of the deceased owner should be accounted for. The appellant refused to account for these shares, and a formal order having been made by the Registrar of Titles directing that the required registration should be postponed until the requirements of Order 4, rule 4, sub-s. 1 and sub-s. 2, were complied with, the appellant further applied by way of appeal to Madden J., who made the order now appealed against.

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Jellett K.C., for the appellant :—

The appellant is entitled to be registered as transferee under the deed. Sect. 35, sub-s. 1, of the Act empowers a registered owner of land to transfer the land, whereupon the transferee becomes entitled to be registered as owner. On the death of the registered owner the land vests in his personal representative (sect. 84, sub-s. 1). The personal representative is not registered as such, but is in the same position as a registered owner, and a transferee from a personal representative must have a right to be registered. No statutory rules can affect the ordinary right of a personal representative to dispose of the chattel real property of a deceased in due course of administration. In any event this case comes within the express words of Order 5. It is a sale by the personal representative to a purchaser for "full money consideration." The Registrar of Titles cannot inquire whether the sum paid was in fact "full money consideration." He has no means of ascertaining whether it is or not. The benefits reserved are to be taken as portion of the "full money consideration," which term ought not to be confined to a monetary payment. The rights (if any) of the next-of-kin who did not join in the deed are not affected. We are not seeking to discharge the equities to which the registration is subject. When a transfer is made without valuable consideration, the transferee takes subject to all unregistered rights under sect. 36, sub-s. 1.

He also referred to sections 30, 63, and 84 of the Act, and to *Re Mitchell and M'Elhinney's Contract* (1).

There was no appearance for any other party.

SIR IGNATIUS J. O'BRIEN C. :—

Although this case is one of considerable importance as affecting the practice with regard to the registration of deeds under the Local Registration of Title (Ireland) Act, 1891, our decision, while confirming the Registrar in his view as to the precautions which must be taken in the course of registration, will in no way affect the title itself of any lands in this country. In the result my view is that where good title could not be shown to lands prior to the

(1) [1902] 1 I. R. 83.

Appeal. 1917.

In re FITZ-MAURICE'S ESTATE.

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Act, the Act itself does not enable good title to be shown, and the Registrar is not bound to register an instrument which on its face does not disclose good title.

The assignment brought in to be registered in this case was one purporting to be made by the widow "as personal representative of the above-named registered owner and as beneficial owner of every estate right title or interest therein to which I am beneficially entitled." [His Lordship referred to the provisions of the deed, and continued:] If this were a case to be considered apart from the provisions of the Local Registration of Title Act, and a purchaser who was entitled to a good title was furnished with a document such as this, would he accept it as conferring a good title upon him? Clearly he would not be bound to do so. The personal representative is, of course, bound in the first place to discharge the debts of the deceased, and the other liabilities which are attached by law to his personal estate. It follows that in the due course of administration the personal representative can make a good title to the chattel real property of the deceased, and where he enters into a contract of sale in his representative character, the purchaser need not inquire whether it is a sale for the purpose of raising money for the payment of debts: *Venn and Furze Contract* (1). But apart from any sale it is well settled, as was stated by Lord Hatherley in *Cooper* v. *Cooper* (2), followed in this Court in *Tevlin* v. *Gilsenan* (3), that "the interest taken by the next-of-kin is clearly an interest in every chattel that formed part of the estate of the intestate subject to the payment, no doubt, of a proportionate part in value of the debts that existed at that time on the part of the intestate."

Now, the present assignment shows clearly on the face of it, that it is not one made solely by the widow in her representative capacity. It is one made, in part at least, for the benefit of the widow herself, as to her own beneficial estate and interest; and by it she seeks to deal with the property for her own benefit, by creating certain charges and privileges of a character which she could not create in her representative character. I am clearly of opinion that in an ordinary case a purchaser would have been

(1) [1894] 2 Ch. 101. (2) L. R. 7 H. L. 53.
(3) [1902] 1 I. R. 514.

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entitled to ask who were the next-of-kin, and whether they consented to the assignment, and in the absence of proof that they did assent to contend that the title shown was a bad title. What, then, is the position of the Registrar under the Act? This enactment was intended not to provide for the registration of deeds—a system which was supposed to have proved unsatisfactory when applied to lands acquired by the tenants under the Irish Land Purchase Acts, but to establish and maintain a register of the ownership of lands in Ireland. It deals with registration of title as distinct from registration of deeds. It is manifest that when a registering authority is set up to establish a register of title to lands, that authority must have jurisdiction enabling him to satisfy himself that the documents which are lodged as affording evidence of a good title do in fact afford such evidence; and he must be empowered to make at least such inquiries as an ordinary purchaser would be entitled to make with regard to the documents of title brought in before him for registration. It is important in this connexion to observe that the Act itself provides for the establishment of an insurance fund to be applied in compensation of owners and others who may suffer loss arising from errors in registration or non-registration.

I leave out of consideration for a moment the effect of the general orders to which we have been referred, and which in my judgment were rightly made. Apart from them, and such statutory force as they may possess, by reason of sect. 94 of the Act under which they were framed, it would, to my mind, be singular if in the present case the Registrar was not entitled to ask, Who were the next-of-kin of the deceased, and have they consented to this assignment? Was he not entitled to say, "This is not an assignment by the personal representative as such; it is, no doubt, executed by the widow as personal representative; but it is also executed by her as one of the persons beneficially interested, and to operate for her own benefit. It is not an assignment by a personal representative in the ordinary sense at all, and I am entitled to the same explanation as an ordinary purchaser"? He is met by the answer: No, we require you to register the assignment, and we will give you no explanation. In such circumstances I consider that apart from any provisions in the rules

applicable to the case, the Registrar was fully justified in saying that the interests of all the next-of-kin must be accounted for. I do not agree that our so deciding will, as suggested, create any fresh difficulties in making title to lands in this country. Prior to the Act of 1891, such an assignment as this would not have been a good root of title, and it was never intended that the statute was to have this extraordinary effect, that the Registrar was blindly to put the machinery of the Act into force, and thereby convert a bad title into a good one.

I come now to the Rules which have been relied upon by the appellant. Rule 5 of Order 4 deals with a case where a personal representative simpliciter conveys "Where on the death testate or intestate of a registered owner of land to which Part IV of the Act of 1891 applies" [that is this case] "who is not registered as a limited owner or as a joint tenant with any other person, his personal representatives have sold the lands to a purchaser for full money consideration, the purchaser may be registered as owner on the lodgment in the proper office of the probate or letters of administration, as the case may be, and the transfer from the personal representatives, together with, if the Registrar so requires, an affidavit identifying the lands transferred with those theretofore registered in the name of the registered owner."

That rule requires that registration shall take place where the personal representative sells to a purchaser for "full money consideration." It has been suggested here that this case literally fulfils the conditions of the rule, because there is a personal representative, and because that personal representative has sold. On the face of the document, however, it is clear that it is not a conveyance by a "personal representative" for full money consideration at all. It is a document of an entirely different character. The Registrar was of opinion that it came under Rule 4 (1), and that the assent of the personal representative was necessary. It appears to me that under the Act itself, no matter what force and effect should be given to sects. 35 and 84 of the Act, you cannot by these sections impose on the Registrar an absolute statutory obligation to register as full owner in a case like the present. No doubt, under sect. 35, "A registered

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owner of land may transfer the land, or any part thereof, and the transferee shall be registered as owner of the land transferred"; and under sect. 84, sub-s. 3, on the death of the registered owner the personal representatives of the sole owner or survivor shall alone be recognized by the registering authority as having any right in respect of the land, and shall have the same powers of dealing with the land, and any registered dispositions by them shall have the same effect as if they were the registered owners of the land."

That applies to a personal representative, who under the statute is not registered as owner of the land at all. It enables such conveyances to be made for the purpose of transferring title as might have been made by a registered owner of land. But I certainly cannot read it as giving to the personal representative power to convey anything which a personal representative as such would not have had power to convey, by reason of the estate having been administered; and if the estate had been fully administered, and if the Registrar knew there was a defect in the title, I should have thought that he would at least have the same right to make inquiries as a purchaser. There is this to be said about rule 5, that in framing the rule, what the draftsman obviously had in his mind was that in the ordinary procedure on title, a simple deed dealing with land, made for a money consideration by a personal representative, gave good title, but there was superadded a provision that in order to come within the protection of rule 5 there must be this "full money consideration." Therefore, it seems to me that in no sense can this case come under rule 5. I am satisfied, notwithstanding Mr. Jellett's able argument, that the document submitted to the Registrar is not a conveyance by a personal representative such as would convey a title which the Registrar was bound to register, and I think the Registrar was right in his decision, and that therefore the order of Mr. Justice Madden must be affirmed.

RONAN and MOLONY L.JJ. concurred.

Solicitor for the appellant: *Matthew J. Byrne.*

R. ST. J. C.

1918.
Nov. 1.

ELLIOTT, Deceased.

MONTGOMERY *v.* POTTERTON.

(1917. No. 674.)

Will—Condition—Restraint of marriage—Condition subsequent.

A testator bequeathed a house held for a chattel term and the furniture and contents thereof to his sister and her unmarried daughters during her life, and after her death he bequeathed "said house and furniture equally to my said nieces but I direct that if any of my said nieces shall marry she shall thereupon forfeit her share and interest in this bequest and the said house and its contents shall go to such of my nieces as shall remain unmarried in equal shares or to the unmarried niece absolutely."

The testator died in 1903, leaving his sister and her three unmarried daughters surviving him. One daughter married in 1905, and a second died a spinster in 1915. The sister died in 1916. The third daughter survived her mother, and was unmarried.

Held, that the intention of the testator was to limit the property until marriage, and not to impose a condition in restraint of marriage, and, accordingly, that in the events that had happened, the surviving unmarried daughter was absolutely entitled to the property.

Adjourned Summons.

By his will, dated 25th July, 1903, Gilbert Elliott provided as follows:—"I give all my interest in the said house No. 5 Charleville Terrace and in the furniture and contents to my brother John during his life and after his death to my said sister Dora Potterton and her unmarried daughters during her life and after the death of the said Dora Potterton I bequeath said house and furniture equally to my said nieces but I direct that if any of my said nieces marry she shall thereupon forfeit her share and interest in this bequest and the said house and its contents shall go to such of my nieces as shall remain unmarried in equal shares or to the unmarried niece absolutely."

The testator died 25th November, 1903, and probate of his will was granted to the plaintiffs. Two of the executors and trustees

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of his will, Dora Potterton, sister of the testator, and her three daughters, Lydia Mary, the defendant Dora Ellen, and the defendant Jane Elliott Potterton, survived the testator. The defendant Dora Ellen married Francis Tanner in May, 1905. Lydia Mary Potterton died 25th August, 1915, without having been married. Her mother, Dora Potterton, died 8th March, 1916. The third daughter, Jane Elliott Potterton, was unmarried. The house, No. 5 Charleville Terrace, was held for the residue of a term of 250 years from 25th March, 1879, under a lease dated 21st April, 1879.

On 13th July, 1917, the plaintiffs issued a summons for the determination of several questions arising on the construction of the will. Number 6 was as follows :—Are the defendants, Dora Ellen Tanner and Jane Elliott Potterton, and the legal personal representative of Lydia Mary Potterton, entitled in equal shares to the house, No. 5 Charleville Terrace, in the city of Dublin, with the furniture and contents thereof, or do the same belong equally to the said Jane Elliott Potterton and the legal personal representative of the said Lydia Mary Potterton or to the defendant Jane Potterton alone?

Poole, for the plaintiffs :—

The first question arising on this clause of the will for decision is, whether the direction that if any one of the nieces should marry she should forfeit her share, is a limitation, on the assumption that the intention was to provide for each niece while she remained unmarried, or is a gift defeasible on subsequent condition, and consequently invalid? or, in other words, is it a simple limitation until marriage, or a limitation defeasible in the event of marriage? The second question is, who is or are entitled in the events that have happened.

Overend, for Jane Elliott Potterton :—

There is sufficient in this clause to enable the Court to carry out the intention of the testator, which I submit was evidently to make a bequest to each niece of a third of the house and premises until marriage. Such a bequest is a perfectly good gift. The

Court will, where possible, construe such a condition as a condi- *Barton J.*
tional limitation, and not as a condition in general restraint 1887.
of marriage. In the events that have happened, Jane Elliott Mosse
Potterton is entitled to the bequeathed property. v.
Potterton.

J. E. Walsh, for Mrs. Tanner:—

The testator is disposing of leasehold premises. He leaves them to his sister, Mrs. Potterton, and her unmarried daughters, during her life. He then abandons the expression "unmarried daughters," and, after her death, bequeathes them to his three nieces absolutely, imposing a condition of forfeiture in the event of marriage. The terms of the bequest cannot be construed as a limitation to his nieces until marriage. The condition imposed as to forfeiture of the absolute interest already given amounts to a condition subsequent in restraint of marriage, and is void: *Morley* v. *Rennoldson* (1); *In re Bellamy* (2). The three daughters took vested interests, and Mrs. Tanner as one of the surviving daughters is accordingly entitled to her share in the premises.

Herbert Jones, for Frank Tanner, the legal personal representative of Lydia Maria Potterton, contended that the effect of the bequest was to give a life estate in the premises to Dora Potterton, with an absolute gift to her daughters as tenants in common. The premises became vested in the daughters on the death of the testator, and were liable to be divested only on marriage, which event did not happen in the case of Lydia Maria Potterton; consequently her representative is entitled to share in the bequest.

BARTON J.:— Nov. 1.

A limitation to a spinster until marriage, followed by a gift over on her marriage, is a valid limitation; and, in my opinion, we have in this will a limitation of this kind. The intention of the testator was not to prevent the marriage of his nieces, but to provide for their maintenance in the house until marriage. In *Evans* v. *Rosser* (3), the observations of Lord Hatherley (then Sir W. Page Wood, V.-C.), in adopting the doctrine of *Heath* v. *Lewis* (4), are much in point. I think the real meaning of the

(1) [1843] 2 Hare, 570.
(2) 48 L. T. R. 212.
(3) 2 H. & M. 190.
(4) 3 D. M. & G. 954.

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clause is a limitation until marriage and then over, the intention being to give the house to the niece, and then if one marries, her interest is to cease. The words used do not, in my opinion, amount to a condition in restraint of marriage. The result is that in the events that have happened the unmarried niece is absolutely entitled.

Solicitors for the plaintiffs: *Montgomery & Chaytor.*

Solicitors for Mrs. Tanner and Frank Tanner: *Giltrap & Lambert.*

Solicitor for Jane Elliott Potterton: *S. D. Lambert.*

R. W. L.

OWEN SMITH (1).

(FOLIO 5033, CO. MEATH.)

1917.

June 5.

Land Registry—Discharge of Equities—Application by Person other than the Registered Owner—Jurisdiction of Registrar—Practice.

O. S. was registered under the Local Registration of Title (Ir.) Act, 1891, as owner in fee-simple (subject to equities) of lands purchased by him under the provisions of the Irish Land Purchase Acts. P. S. claimed that the interest purchased by O. S. was a graft upon his former interest in the lands, and that by virtue of certain instruments of title executed prior to the purchase he (P. S.) was entitled to an absolute interest in remainder in the lands subject to the life-interest therein of his mother, and to a mortgage affecting the lands. He accordingly applied to the registrar to investigate the title to the lands, to ascertain and enter on the register the burdens (if any) affecting the lands, and to cancel the note as to equities. O. S. refused to consent to the application, and denied the jurisdiction of the registrar to entertain it.

Held, by the Court of Appeal (Ronan and Molony L.JJ., Sir I. J. O'Brien C. diss.), affirming the decision of Madden J., that the registrar had general jurisdiction under the Act to complete the register, and that it was competent for him to entertain the application.

This was an appeal by the registered owner from an order of Madden J. (sitting as Land Judge), dated the 27th November, 1916 (2), by which the learned judge upheld the ruling of the registering authority, deciding that the latter had jurisdiction to entertain an application by Patrick Smith, requiring the registering authority to investigate the title to the lands, to ascertain and enter in the register the burdens (if any) appearing on such investigation to affect the lands, and to cancel the note as to rights or equities which had been entered on the folio.

Owen Smith was registered under the Local Registration of Title (Ir.) Act, 1891, as owner in fee-simple (subject to equities) of lands purchased by him under the provisions of the Irish Land Purchase Acts. Patrick Smith claimed that the interest purchased by Owen Smith was a graft upon his former interest in the lands,

(1) In the Court of Appeal, before SIR IGNATIUS J. O'BRIEN C., and RONAN and MOLONY L.JJ.

(2) Reported [1917] 1 I. R. 170.

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and that by virtue of certain instruments of title executed prior to the purchase he (Patrick Smith) was entitled to an absolute interest in remainder in the lands subject to the life-interest therein of his mother, and to a mortgage affecting the lands. He accordingly applied to the registrar to investigate the title to the lands, to ascertain and enter on the register the burdens (if any) affecting the lands, and to cancel the note as to equities. Owen Smith refused to consent to the application, and denied the jurisdiction of the registrar to entertain it.

The only question argued was as to the jurisdiction of the registrar to entertain the application.

Garrett W. Walker K.C. and *Monroe*, for the appellant.
Carrigan K.C., for the respondent.

SIR IGNATIUS J. O'BRIEN C.:—

The appeal in this case involves a question of some importance with regard to the administration of the Local Registration of Title (Ireland) Act, 1891; but it affects only procedure, and the view which I take of the construction of the statute, although it differs from that of Mr. Justice Madden, will not, I think, have any prejudical effect on the smooth working of the machinery for registration of title.

Owen Smith had been registered as owner of lands, which had been purchased under the Land Purchase Code, with a note that the registration was subject to equities. He refuses to consent to the jurisdiction of the registering authority to decide the question raised in the application, and contends that without such consent the registering authority has no jurisdiction "to hear and determine it." The registering authority, as defined by sect. 4, sub-s. 7, of the Act, means the Clerk of the Crown and Peace, or other person specially appointed in respect of the local office, and the registrar of Titles, so far as the central office is concerned; and each is referred to in the statute as "a registering authority." It is to be observed that, although in normal circumstances, the officer appointed will be a person with a legal training—a barrister or solicitor—he may not necessarily in all cases possess this qualification. Under sect. 11 any officer of

the central office may be appointed to discharge the duties of the registrar, and any other officer of the local office may be appointed to discharge the duties of the local registrar. The registering authority has considerable powers and duties with regard to the investigation of titles of land, and of burdens affecting it; and an appeal lies, under sect. 14, from his decision to the Court, and from the Court to the Court of Appeal: but in such circumstances the order of the Court of Appeal in all cases, and the decision of the Court itself, in the cases where it refuses to give leave to appeal, are absolutely final and conclusive. The expression "the Court" means the High Court of Justice (also in prescribed cases the County Court); but the jurisdiction is exercised by the Land Judge, or other judge named for that purpose. Where a dispute occurs, or a doubt is entertained as to the jurisdiction of the central authority to hear and determine, he may, of his own motion, refer any question of law or fact, arising in the course of registration, to the Court.

In the present case an objection was raised before the registrar, sitting as registering authority, to his jurisdiction to hear and determine the application. The registrar, by his order, held that he had jurisdiction to hear and determine. On appeal Mr. Justice Madden held that this view was correct; and, if I understand his judgment rightly, he has intimated that a similar view has prevailed since the Act came into operation. I think that some confusion was introduced into the case by the form in which the objection to jurisdiction was taken; but the actual legal position is made perfectly clear by the order which was made by the registrar, deciding that he had power to hear and determine the case. While there is jurisdiction to hear and determine, the exercise of that jurisdiction may certainly in some cases be checked by the person who is the registered owner; and where such a check is interposed the machinery provided by the statute for determining the matter in dispute is different both in form and substance from the procedure where the registrar has jurisdiction; in form because a proceeding has to be initiated in the Court with the result—which I treat as a matter of substance—that an appeal may lie to the House of Lords. In order to understand the difference

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between the two procedures, attention must first be directed to sect. 45. This section deals with burdens affecting registered land not exempt from registration. By sub-s. 2 a burden may be registered either on the application of the registered owner of the land or of any person entitled to or interested in the burden; but there is this clear qualification, that if the registered owner of the land does not expressly, or by implication, consent to the registration, the burden shall not be registered except in pursuance of an order of the Court.

In my opinion, the plain meaning of this sub-section is that while there is jurisdiction on the part of the registrar as registering authority to hear and determine, if consent is given, the tribunal which has jurisdiction to determine the question in the absence of such consent, express or implied, is not the registrar but the Court, not the Court acting as an appellate tribunal, because that would amount to an admission of the jurisdiction of the registrar in the first instance to determine the question, but the Court exercising an initial jurisdiction, which in such a case can only be exercised on an independent application to the Court, and not by appeal from the registrar or other registering authority. The reason for this does not seem to me to be far to seek. While in normal circumstances it was thought desirable, everyone consenting, that the registering authority should have jurisdiction to hear and determine, it was considered that if there was a contest between the parties which, apart from the Act, would have to be determined by a Court of competent jurisdiction, this latter jurisdiction was not to be ousted, but should remain in it uncontrolled in any way by the action of the registering authority. In such a case the registrar does not, nor could he, in my opinion, refer the matter, as has been urged, to the judge. Such a proceeding would make either the judge or the Court of Appeal the ultimate tribunal at the discretion of the registrar. The power of the registrar to refer questions to the judge can only arise where he is the tribunal for determining as well as hearing applications under the Act. This is to my mind the true interpretation of sect. 45, and this brings me to the question of jurisdiction raised in the present case.

Sect. 29, which deals primarily with first registration, enables

one of two courses to be pursued with regard to what in the case of *In re Haslette* (1) I have, for convenience, described as graft, burdens. I have so described them because, strictly speaking, they may not be burdens at all, but really rights to the land itself, which are artificially placed on the basis of burdens for the purposes of this section. By the operation of sub-sections 1 and 2, where the applicant for registration so requires, the registering authority shall ascertain all burdens affecting the land except those to which without registration the land shall be subject; but if the applicant does not so require, the registering authority has power to dispense with the ascertainment of such of the burdens affecting the land as have arisen from the interest vested in the purchaser by the conveyance or vesting order being deemed to be a graft upon his previous interest in the land, or as have arisen in any other manner from the existence of such previous interest. Under sub-section 4 the registered owner is given power to apply to the registering authority at any time to ascertain the burdens and cancel the note which under sub-section 3 may have been entered on the register in order to preserve the graft burdens. We have here, up to a certain point, in regard to graft burdens, a similar provision to that contained in sect. 45 in regard to what may be called ordinary burdens. The section, however, so far provides only for an application by the registered owner. Upon this omission from the clause of anyone except the registered owner the appellants based an argument that no one, except the registered owner, could apply to the registering authority with respect to graft burdens after the first registration; and that the impediment not only extended to the determination by the registering authority of the question involved, but deprived that authority of any jurisdiction to proceed with the inquiry in the absence of the consent of the registered owner. That is the point that has been argued before us, and I think it was the only question argued before Mr. Justice Madden. I rather think that the cases that would in any event go beyond the Court of Appeal would be few in number, but still the absolute right to go to the House of Lords can never be considered an unimportant matter.

(1) [1915] 1 I. R. 285.

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Hence, as I have said, the question is one of substantial importance.

The conclusion at which I have arrived is that the registrar has the same jurisdiction in regard to the ascertainment of graft burdens, kept alive by the note on the register as to equities, as he has in the case of burdens under sect. 45, but no more. Speaking broadly, while it never could have been intended that the opposition of the registered owner should be more fettered in the case of graft burdens than in relation to burdens under sect. 45, one would hardly expect to find the machinery set up by the Act in the one case different from that in the other. Burdens under sect. 47 which do not for their validity and effect require registration may be registered; and, indeed, apart from sect. 47, some of them would, I think, have come within sect. 29; and one of these, viz. dower mentioned in sect. 45, might have been included in sect. 29. Probably the technical distinction between the possession of a right to dower and the assignment of the dower may have caused the special insertion in sect. 45 of "any estate in dower." Very wide powers are given in clause 11 to extend sect. 45 to other matters.

The last clause of sect. 29, sub-s. 3, enacts that "the provisions as to burdens, to which, though not registered, all registered land is declared by this Act to be subject, shall apply to such rights and equities" as are preserved by the note on the register. Under the second proviso to sect. 47, the registering authority may enter on the register any of the burdens mentioned in the section; but here again the jurisdiction can be exercised only with the consent of the applicant or registered owner. Without that consent an order of the Court must be obtained. In the case of all burdens, whether they are under sect. 45 or sect. 47, the jurisdiction of the registering authority to determine applications is limited. Why should they be greater in the case of graft burdens? In order to avoid the construction of sect. 29, sub-s. 4, which the appellants contend for and which I do not adopt, I have to read sects. 29, 45, and 47 together. I avoid this construction by holding that the last clause of sect. 29, sub-s. 3, introduces all the provisions as to procedure contained in the later section, and that it follows that a person other than the registered owner may make

application, but if I bring over the jurisdiction I must bring over the limitation, and the limitation will produce the result that the jurisdiction of the registering authority stops when the registered owner declines to submit to it.

Accordingly, I am of opinion that in all cases of rights and equities which are called burdens under section 29, and in all cases under sects. 45 and 47, we have a perfectly simple and intelligible procedure,—a jurisdiction to hear and determine, either on the application of the registered owner or the person claiming a title to or in respect of a burden: a jurisdiction, however, liable to be ousted where the registered owner prefers that the primary tribunal should be the court, be it the High Court of Justice or the County Court. Of course the person who applies, whether he be owner or claimant, is always presumed to have consented to the jurisdiction which he has himself invoked. There is nothing to prevent the Land Judge from staying his hand if by reason of the magnitude of the issue involved in any case he considers that course necessary, so that proceedings may be taken by action instead of adopting the simple procedure provided by the statute and general orders thereunder. But, generally speaking, the simple procedure by summons would seem to me to meet all requirements. For the reasons I have given I am of opinion that the order of Mr. Justice Madden, affirming the decision of the registrar, should be reversed.

RONAN L.J.:—

I had actually written a judgment on the same lines as that delivered by the Lord Chancellor, but on re-consideration of the judgment of Madden J. and several sections of the Act involved, I have felt constrained to alter my view, and to adopt the view of the learned Judge.

The view adopted by Madden J. appears to be this, that a judicial jurisdiction to complete the registration by doing what has been dispensed with under sect. 29, sub-s. 2, is to be implied from the whole scope, object, and purpose of the Act. The learned judge has pointed out that for sixteen years this view has been acted on, and on it the settled practice of the office under the Act has been based. We are now asked to upset this

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practice. I shall refer later to the judgment of Madden J. He does not treat the case as coming within either sect. 45 or 47, or any specific section of the Act, but he holds that on the entire scope of the Act there is a duty cast on the registering authority to complete the registration.

What has impressed me with the importance of the case is that, unless the view of Madden J. is right, there is *no jurisdiction under the Act* by means of which parties in the position of the applicant and his mother—no matter how small the tenancy or how clear the title—can get their title put on the register. This seems to me a very grave question indeed.

The Lord Chancellor has said, in the course of his judgment, that in this 29th section there have been grouped together under the name of "burdens" things which may not strictly speaking be burdens at all, but rights to the land itself. The position in the present case affords a good illustration of that. According to the applicant his mother is tenant for life of the land in question, he himself is owner of an estate in fee expectant on his mother's decease, and the fee-simple is subject to a mortgage. The registered owner is the father of the applicant; he appears to have no interest in the land at all; he is a bare trustee. Therefore, so far as the interests of the applicant and his mother are concerned, they are not burdens at all, but actual estates in the land, of which they are the owners subject to the mortgage. The burden, in the strict sense of the term, is the mortgage to the company. What is sought on their behalf is that instead of this bare trustee, they should appear on the register as tenant for life and remainder-man respectively.

It is to be observed that there is no definition of "burden" in the Act itself. The term is used for the sake of convenience, and indeed were it not for the provisions of the Act relating to burdens and their registration, there would in many cases be a grave difficulty in tenants who have purchased their holdings under the Irish Land Purchase Acts becoming registered owners at all. Sect. 30, sub-s. 4, provides that "if the registered owner holds the land as trustee, nothing in this section shall affect his duties or liabilities as such trustee." My impression is that the Lord Chancellor has laid it down in a reported case that this sub-section

applies as well to a constructive as to an express trustee. In the note to sect. 28 of the Act in Browning and Glover (p. 116) it is stated, "as a general rule only persons beneficially entitled are registered as owners." Therefore, at first sight it would appear as if the bare trustee should not appear on the register at all What is the substance of the present application? Sect. 63 provides that trusts shall not be entered on the register (except as provided by the Act); therefore the application cannot mean that the rights of the wife and the son should be entered on the register as burdens. These rights depend upon trusts affecting the ownership of the land. The application is to have the note cancelled. It asks the registering authority "to investigate the title to the lands, to ascertain and enter on the register the burdens (if any) appearing on such investigation to affect the lands, and to cancel the note as to rights or equities which had been entered on the folio." The note protects the rights of the tenant for life and remainder-man, and, as I have said, the mortgage is really the only burden in the ordinary sense of the word. It is the beneficial interest of the tenant for life and of the applicant that is subject to the mortgage.

As I have said, there is no definition of burden to be found in the Act. Generally speaking, the Act seems based on the idea of ownership subject to burdens, burdens being rather of the nature of incumbrances on the owner's interest. The difficulty in the present case seems to me to arise from the inclusion among burdens, in cases where the principle of graft applies, of what often is a matter of ownership not of burden, e.g. the simple case dealt with in the judgment of Madden J., where on the doctrine of graft the registered owner was proved to be a trustee for the person who applied to have the equities ascertained and the note as to equities cancelled. This resulted in his name being substituted for that of the registered owner in the register, not in the registration of a burden under section 45, or the placing of a note on the register under section 47 of the Act. Section 29 is a special section dealing with registration in land purchase cases only. It is in such cases alone that the dispensing power is given to the registering authority, and this is a discretionary power. It is plain from this that the general obligation under the Act is—1, to ascertain the

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right of an applicant to be registered as owner, and 2, to ascertain all the burdens, whether arising from graft or not. In the present case both the ownership and the burden arise from the principle of graft.

Section 29, sub-s. 1, provides that "Before the first registration of any person as owner of land purchased under any of the provisions of the Purchase of Land (Ireland) Acts, the registering authority shall, if so required by the applicant for registration, ascertain and enter in the register in the prescribed manner all burdens which, upon the prescribed examination of title, appear to affect the land, except those to which, though not registered, all registered land is declared by this Act to be subject." Sub-s. 2 then provides that when the applicant for registration has not so required, the ascertainment of these graft burdens may be dispensed with if the registering authority thinks fit. If he does not think fit, what is he to do? He must ascertain them and enter them on the register. There is no express power given by the Act to do this. There is no provision contained in the Act as to applications to the judicial discretion of the registering authority to determine whether these burdens should be ascertained or not. The provisions in sub-ss. 1 and 4 of sect. 29 are not such provisions. They provide that in the one case the applicant, and in the other the registered owner, may decide that the burdens are to be ascertained and entered on the register, and the registering authority must obey his direction. These are mandatory provisions, and not provisions giving a judicial discretion to the registering authority.

I have already pointed out that sect. 29 only deals with land purchase cases. Burdens under the Act may be grouped into three classes. First, those specified in sect. 45, which I may term ordinary burdens, such as incumbrances and charges; secondly, burdens within sect. 29, sub-s. 2, which I have followed the Lord Chancellor in terming "graft burdens"; and, thirdly, the burdens specified in sect. 47, to which all registered land is subject, whether the burdens be or be not registered. Sect. 45, sub-s. 1, provides that the first class of burdens may be registered. Graft burdens under sect. 29 must be registered if the applicant so requires. If the applicant does not require the registration,

the registering authority may dispense with it, but must in such case enter on the register the note as to equities; and the note has the effect of protecting all the rights arising from the application of the doctrine of graft. Subsequent to the first registration the registered owner can at any time come in and require to have the note cancelled, and the registering authority must obey him; but (and this is an important consideration) where the note is cancelled all the graft burdens must be ascertained and entered. This is involved in the cancellation of the note. Therefore, in a case such as the present, the mortgagee could not come in and apply to have the note cancelled. The cancellation of the note would involve the ascertainment of the rights of the mother and son.

In cases other than land purchase cases there would appear to be no distinction between graft burdens and other burdens; all must be treated alike. There is no provision for dispensing with their ascertainment, or for making a note such as that provided for by sect. 29, sub-s. 3. Sect. 30, sub-s. 6, provides that "on an application for registration as owner of land, the applicant shall disclose to the registering authority all burdens which to his knowledge affect the land, and the registering authority shall enter on the register all burdens which appear on examination of the title to affect the land except those to which, though not registered, all registered land is declared by this Act to be subject." This section is mandatory. Sects. 45 and 47 apply to all cases; sect. 29 only to land purchase cases. Sect. 45, sub-s. 2, provides that "A burden may be registered under this section on the application of the registered owner of the land, or of any person entitled to or interested in the burden." This enables a person interested in a specific burden to apply to have it registered; but, in my judgment, the sub-section has no application whatever to the case of the owner of an equitable right to land seeking to be registered as owner. It only applies to burdens properly so called. This section does not appear to me to authorize a person interested in a graft burden to apply to have the note cancelled, and the entire class of graft burdens ascertained, though he may have no interest in any but one burden of the class. An order of the Court is in any case necessary under sect. 45,

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sub-s. 2, when the application is made without the concurrence of the registered owner of the land.

Section 47, dealing with burdens which, without registration, are to affect registered land, has occasioned me some difficulty. The second proviso to this section enacts: "When the existence of any of the burdens in this section mentioned is proved to the satisfaction of the registering authority, the authority may, with the consent of the applicant or registered owner, or in pursuance of an order of the Court, enter notice thereof on the register"; and by the final clause of sub-s. 3 of sect. 29 the provisions of the Act as to such burdens are made applicable to the rights and equities dealt with in this 3rd sub-sect. Does the second proviso to sect. 47 then apply to the cancellation of the note as to graft burdens if existing?

The proviso consists of two parts. The second part is clear; it deals with what the registering authority may do—he may enter notice of the burden on the register. The first part of the proviso contains the conditions or terms on which he may do this. The first of these is clear and simple—"when the existence of any of the burdens in this section mentioned is proved to the satisfaction of the registering authority." Until this has been done the section cannot operate. The registering authority must therefore have jurisdiction to hear the evidence as to the existence of the burden, and to determine whether it has been proved to his satisfaction. When this has been done, the registering authority may "with the consent of the applicant or registered owner, or in pursuance of an order of the Court," enter the notice on the register. The words "consent of the applicant or registered owner" are obscure; but it must be observed that no question arises as to such consent until the existence of the burden has been proved to the satisfaction of the registering authority. It is obvious that this consent cannot be dispensed with when the applicant is not the registered owner without giving the latter an opportunity of being heard. But this proviso does not authorize the ascertainment of all the graft burdens, or the cancellation of the note under sect. 29, sub-s. 2; it does not even authorize the registration of any specified burden as under sect. 45. It merely authorizes an entry of a notice of the burden on the register. That is not the

jurisdiction sought to be exercised in this case, and the proviso in my judgment has no application to it. It is difficult to see what effect a new note in relation to graft burdens could have if the original note under sect. 29, sub-s. 2, remains (as it must) on the register. I at present cannot see how the note under sect. 29, sub-s. 2, can be dealt with under sect. 47. It is plain that Madden J. never thought of dealing with this case under either section 45 or 47, and I do not think these sections apply to such a case as this.

I now turn to the judgment of Madden J. He calls attention to the fact that the 29th section applies only "to land purchased under any of the provisions of the Purchase of Land (Ireland) Acts"; and as to the effect of this section, he says (1) it is "to enable the registering authority, if he should think fit, to dispense with the ascertainment of burdens as a condition precedent to first registration in the class of cases to which the section applies, which are cases in which registration is compulsory." I may add that the fact that the registering authority is only entitled to dispense with the ascertainment of burdens if he should think fit shows conclusively that normally the burdens should be ascertained, and in every case, except land purchase cases, this must be done.

The learned judge then continues:—"The ultimate completion of the register by the ascertainment and registration of burdens is contemplated. This is obligatory on the registering authority when an application to this effect is made by the registered owner (sub-s. 4). In other cases no statutory obligation is cast upon the registering authority." It is plain on the face of this Act that the completion of the register at some time is contemplated; there must be jurisdiction to complete it; and, in my judgment, any person interested in having the register completed has the right to apply to have this done, although, as pointed out by Madden J., "his interest in the land may be too remote or insignificant to entitle him, in the opinion of the registering authority, to impose on the land the burden of an investigation which might be troublesome and expensive." That is a matter for the registering authority to consider on the hearing

(1) [1917] 1 I. R., at p. 176.

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of the application. I agree with Madden J. when he says that there is nothing in the language of the statute to restrict to registered owners the right to apply to have the register completed, and also that a contrary conclusion "would narrow the jurisdiction of the registering authority in a manner which would be at variance, not only with the expressed policy of the Act, but with the established and unquestioned practice since the passing of the Local Registration of Title Act"—a practice as to which the learned judge gives the remarkable statistics contained in his judgment. I am unable to see, unless Madden J. be right in his conclusion, what remedy there is open by means of which persons who are entitled to equitable interests in registered land under the doctrine of graft can obtain a recognition of their rights on the face of the register, and a discharge of the note as to equities; and, where a useful and continuous practice has been adopted, as pointed out by Madden J., it ought not, in my judgment, to be disturbed. I am, accordingly, of opinion that the order appealed against ought to be affirmed.

MOLONY L.J.:—

I must confess that, like my colleague Ronan L.J., I have changed my opinion on this case since the hearing, and, having regard to the dissent of the Lord Chancellor, I have arrived at my present view with considerable hesitation.

On the 30th September, 1915, Owen Smith was registered as owner in fee-simple of the lands of Woodtown, in the county of Meath (folio No. 5033), and the registration was made expressly subject to the rights or equities (if any) arising from the interest vested in the said Owen Smith by fiat of the Irish Land Commission, dated the 1st May, 1915, being deemed to be a graft on his previous interest in the said lands, or arising in any other manner from the existence of such previous interest.

Patrick Smith, who claimed that his mother, Elizabeth Smith, had a good title to an estate for life in the lands, and that, subject to such life estate, and a charge of £100 in favour of Christopher Smith, which would become raisable on her death, he was absolutely entitled to the fee-simple, applied on the 16th September, 1915, to the Registrar to investigate the title to the tenancy, and

to ascertain and enter on the register the burdens (if any) appearing on such investigation to affect the lands, and to cancel the note as to rights or equities then entered on the said folio.

Owen Smith was duly served with a notice, dated the 31st January, 1916, in which, after setting out the nature of the application made to the Registrar, he was cautioned that unless he showed good cause to the contrary within ten days after the service of the notice upon him, Mrs. Elizabeth Smith would be registered as limited owner of the said lands.

In response to this notice Owen Smith, on the 10th February, 1916, filed an objection to the application, upon the ground that the Registrar of Titles had no jurisdiction to entertain it, or any part thereof, and that there was not vested in Patrick Smith any power or authority to make such application under the provisions of the Local Registration of Title (Ireland) Act, 1891, or otherwise; and he further stated specifically the grounds upon which he objected in law to the registration of the said Mrs. Elizabeth Smith as limited owner.

The matter next came before the Registrar on the 6th April, 1916, and the Registrar then made an order that the said Owen Smith, having raised a preliminary objection to the jurisdiction of the Registrar to hear and determine this application, and the Registrar being of opinion that he had jurisdiction, it was ordered that such preliminary objection be disallowed.

The matter was then brought before Mr. Justice Madden on appeal, and on the 28th February, 1917, the learned judge affirmed the order of the Registrar.

When a tenant purchases under the provisions of the Purchase of Land (Ireland) Acts he is entitled to require the registering authority, on the first application, to ascertain and enter on the register the burdens in the prescribed manner, except those to which, though not registered, all registered land is declared subject. If, however, the applicant does not require it, the registering authority may dispense with the ascertainment of such of the burdens affecting the lands as had arisen from the interest vested in the purchaser by the conveyance or vesting order (as the case may be) being deemed to be a graft upon his previous interest, or to have arisen in any other manner from the existence of such

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previous interest; and if the Registrar did so dispense, he was bound to make a note in the prescribed manner.

In the present case the registering authority dispensed with the ascertainment of the graft burdens, and a note was duly entered on the register in the prescribed manner, the effect of which was that the rights or equities continued to have full force and effect, notwithstanding the registration.

Sect. 29, sub-s. 3, specifically provides that the provisions as to burdens to which, though not registered, all registered land is declared by the Act to be subject, shall apply to such rights or equities (if any), and under sub-s. 4 the registered owner may at any time apply to the registering authority to ascertain the burdens, and when he does so the registering authority is bound to ascertain and register them on the register.

Had the title been investigated at the time of the first registration, it would have been seen, according to the applicant, that Owen Smith was not entitled to any estate or interest in the lands, and it is claimed that the Registrar should now entertain the application—(*a*) under sect. 29, sub-s. 4; (*b*) under sect. 29, sub-s. 3, and the provisions of sect. 47; (*c*) under the general jurisdiction given to the registering authority to ascertain the burdens, unless he shall think fit to dispense with such ascertainment, and upon the whole scope and object of the Act.

As regards (*a*), I am of opinion sect. 29, sub-s. 4, gives no assistance in the present case. It does not apply to any person not the registered owner, and once it is invoked it is mandatory on the registrar to comply with its provisions. As regards (*b*), the matter is somewhat different. Sect. 29, sub-s. 3, is important, because it makes the rights or equities subject to the same provisions as the burdens which are specifically mentioned in sect. 47. Proviso 2 of sect. 47 provides that where the existence of any of the burdens in that section mentioned is proved to the satisfaction of the registering authority, the registering authority may, with the consent of the applicant (that is the applicant for first registration), or the registered owner, or in pursuance of an order of the Court, enter notice thereof on the register. The effect of this proviso is that a person interested in a graft burden has a right to go before the registering authority and prove the existence of the

burden, and then, if the registered owner consents, the registering authority can enter notice thereof on the register; but if the registered owner does not consent, the registering authority can do nothing further except in pursuance of an order of the Court. This, however, is no assistance in the present case, where it is necessary to strike out one person as owner and insert the name of another. Even giving the widest construction to sect. 47, it is, I think, impossible to stretch its provisions so far as to enable a change in the name of the registered owner to be made under its provisions.

I think, however, that, apart from sect. 29, sub-s. 4, and sect. 47, the registrar has, on the whole scope and object of the Act and for the weighty reasons given by Mr. Justice Madden, a power to entertain the application. Sect. 29 shows that it was intended in every case to ascertain the burdens on the first registration, unless the registrar dispensed with their ascertainment. If he dispensed, then the title could be registered subject to equities; and it is contended here that once he registered *A* as owner subject to equities, he was for ever after debarred from cancelling the note, unless on the application of *A* under sect. 29, sub-s. 4, although it was conclusively shown by a person interested that *A* had no title whatever, and the lands were really owned by *B*. I am unable to give effect to this contention. It was never, I think, the intention of the Legislature that where a person was wrongly named as owner in the certificate, the error, no matter how palpable, could only be rectified by a Chancery action. The power, however, is a discretionary one to be exercised with great caution; and I agree with the observations of Mr. Justice Madden as to the manner in which the discretion should be exercised.

Solicitors for the appellant: *Falls & Co.*
Solicitors for the respondent: *John Clarke & Co.*

R. ST. J. C.

M. R.
1917

In re GALWAY AND SALTHILL TRAMWAYS CO.

Dec. 11, 19. *Company—Winding-up—Impossibility of carrying on business—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *sect.* 129 (vi)—*Companies Clauses Act*, 1845 (8 *& 9 Vict. c.* 16), *sect.* 90.

The directors of a company are not entitled, without the authority of a general meeting of the shareholders, to present a winding-up petition in the name of the company. But where directors have presented a winding-up petition in the name of the company without authority, it is open to a general meeting of the shareholders to ratify their action.

Petition.

This was a petition to wind up the Galway and Salthill Tramways Company, and was brought in the name of the company, which is an unregistered company, incorporated under the provisions of the Galway and Salthill Tramways Act, 1877 (40 & 41 Vict. c. cexxxvii), with an authorized capital of £35, 000, of which £15,990 has been paid up. The petition stated that the debts of the company, as of July, 1917, amounted to about £359, and that further debts had been incurred since then; that for some years past the assets of the company had been decreasing and its liabilities increasing; that the company by reason of want of capital was not able to carry on its business and that it would be useless to issue any further capital, and that it was just and equitable that the company should be wound up. The petition was opposed by certain of the shareholders.

Fetherstonhaugh K.C. (with him *O'Byrne*), in support of the petition:—

The company is in a hopeless condition; it is carrying on business at a loss, and a still greater loss will be incurred every year. The only assets are the trams, rails, horses, and £266 in bank, and a large sum requires to be expended on the repair of the track. This is an unregistered company which can only be wound up by the Court: Companies (Consolidation) Act, 1908, sects. 267, 268, sub-s. 1 (i), (ii), (iii).

[O'CONNOR M.R.—Have the directors of a company power to present a petition of their own motion without the authority of a general meeting?] They have power under sect. 90 of the Companies Clauses Act, 1845, which is incorporated in the Company's private Act. In any event the petitioners are shareholders, and a minority of shareholders can present a petition for winding up the company: *In re German Date Coffee Co.* (1). [O'CONNOR M.R.—But this is the petition of the company itself.] There is a complete deadlock. Section 40 of the private Act provides that there shall be three directors, but in fact there have been only two for some years, and it would not be possible to find another shareholder possessing the requisite number of shares to act as director. The words "just and equitable" in sect. 129 and 268 (i), (iii) of the Companies (Consolidation) Act, 1908, should be liberally construed: Buckley's Companies (Consolidation) Act, 1908 (ed. 1909), p. 304.

Henry K.C., *Dickie K.C.* (with them *Coffey*), for shareholders opposed to the petition:—

The petition, not having been authorized by a meeting of the shareholders, is ultra vires: *In re Joint Stock Coal Co.* (2); *Smith* v. *Duke of Manchester* (3). A meeting of the shareholders could not now ratify the presentation of this petition. Even if the directors had brought this petition as shareholders, they have not made out a case for winding up the company; it has not been shown that the company is unable to pay its debts: *Re Horsham Industrial and Provident Society, Ltd.* (4). Where, as here, there is not the prescribed number of directors in existence they have no power, even if the number in existence is more than a quorum: *In re Alma Spinning Co.* (5).

Fetherstonhaugh K.C., in reply.

Cur. adv. vult.

(1) 20 Ch. D. 169.
(2) L. R. 8 Eq. 146.
(3) 24 Ch. D. 611.
(4) 70 L. T. (N. S.) 801.
(5) 16 Ch. D. 681.

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In re Galway and Salthill Tramways Co.

Dec. 19.

O'Connor M.R.:—

In this matter a petition has been presented for the winding up of the Galway and Salthill Tramways Co., and the petition on its face is that of the company. The petition is opposed by some of the shareholders, who make the legal objection that it was filed by the directors of their own motion, without the authority of the shareholders obtained at a general meeting of the company, and was ultra vires. It is admitted that there was no meeting of the company authorizing the petition for winding up, but it is contended that the directors had power under the general authority vested in them to present the petition, and that in the special circumstances of the case it was not only right that they should do so, but was the only course open to them. This is the point for decision.

The company was incorporated by the Galway and Salthill Tramways Act, 1877. It has an authorized share capital of £35,000, but of that only £15,990 has been issued. The Act provides that the number of directors shall be three, and that two shall form a quorum; but for some years back there have not been more than two directors. I will refer to this later on. The Act incorporates the Companies Clauses Act, 1845, and the constitution of the company is thereby regulated. The powers of the directors, whatever they are, must be determined by reference to this Act. The petition states that the debts and liabilities of the company amounted to £359 in June, 1917, and that further debts have since been incurred; that for some years the assets of the company have been decreasing and its liabilities increasing; that there is a falling off in the traffic and a considerable increase in expenses; and that the company is at present unable to pay its debts, and by reason of want of capital is unable to carry on its business. It is also stated in effect that it would be futile to invite the shareholders or the public generally to subscribe more capital, because no one would subscribe; and that the rolling stock and permanent way are worn out and require renewing. But, notwithstanding all this, it is stated that the assets if realized would be more than sufficient to pay the company's debts. In these circumstances, it is alleged that it is just and equitable

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GARW BAY TRAMWAYS CO.

that the company should be wound up. The statements in the petition have been challenged by the shareholders who oppose the petition; but on the evidence I am bound to come to the conclusion that the undertaking is in a moribund condition, and, unless galvanized into a new life by agencies which appear to be unavailable, must, shortly disappear, no matter what happens in this Court.

But the question is, had the directors power to present the petition? I am satisfied that the company is an unregistered company within the meaning of sect. 268 of the Companies Act, 1908, but that is not the point of the case. The point is, had the directors, without the authority of the company conferred by a general meeting of the shareholders, the right to present a petition for winding up? Counsel in support of the petition maintain that they have, and they say that the authority is conferred by section 90 of the Companies Clauses Act, 1845. That section enacts that the directors shall have the management and superintendence of the affairs of the company, and they may lawfully exercise all the powers of the company, except as to all such matters as are directed by that or the special Act to be transacted by a general meeting of the company. Counsel contend that all the powers of the company are thereby vested in the directors, except such as are specially excepted, and that the power of presenting a petition for winding up is not within the exceptions. But in my opinion that part of the section which gives the directors all the powers of the company subject to the exception must be read along with the opening words giving powers of management, and is merely in aid of the proper and effective exercise of such powers. If I am right in this, the powers of the directors are only powers of managing, and if the argument relied on is sound, a winding up of the company must come within the scope of its management. But the object of management is the working of the company's undertaking, while the object of a winding-up is its stoppage. On this ground alone I would hold that the directors had no power to present the petition in the present case, but there is another consideration which seems to me to be even more conclusive. A winding up was not at all within the purview of the Companies Clauses Act, 1845. A perusal of the Act shows that it

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was only intended to prescribe generally for the carrying on of a company's business as distinguished from putting an end to it. I have not been referred to any authority on the point, and so far as my own researches have gone there is none.

It was forcibly pointed out by Mr. Dickie that by sect. 91 there are certain powers which can only be exercised at a general meeting. These are the choice and removal of directors, the choice of auditors, the remuneration of directors, auditors, treasurer, and secretary, the determination as to the amount to be borrowed, &c. These are important powers specially reserved to the company in general meeting, and it would be a strange thing if the still more important power of putting an end to the company's business was left to the directors.

It may be that when the matter of winding-up is brought before a general meeting of the company the shareholders may feel obliged to recognize that it is no longer possible to carry on the undertaking, and that a winding-up is inevitable. That may be so; but the possibility, or even the probability, of such an event does not legalize the unauthorized act of the directors.

I am, for these reasons, of opinion that I ought not to make an order at present for the winding-up of the company, and that the proper course to adopt is to adjourn this hearing so as to enable the directors duly to summon a meeting of the shareholders, with the object of getting authority from them to proceed on the petition. I have been asked to dismiss the petition on the ground that, as it was presented without authority and ultra vires, it cannot now legally be ratified. That is not my view. If the petition were ultra vires the company, of course it could not be ratified; but it was quite within the powers of the company to authorize the filing of a petition on its own behalf for a winding-up. That being so, it has now power to ratify the petition already filed without authority.

There are, no doubt, limits to the power of ratification. The person on whose behalf the unauthorized act was professed to have been done must have been in existence at the time. For instance, a contract purporting to be made on behalf of a proposed company not then in existence is void and incapable of ratification by the company as afterwards incorporated. But in the present case the

directors presumed to act on behalf of an existing company, and it is now open to the company to ratify their unauthorized proceeding. A case in point is *Irvine* v. *The Union Bank of Australia* (1), in which directors exceeded their power of borrowing on behalf of their company, although the company had itself power to contract for the loans. The lenders, while admitting that the act was ultra vires, contended that it was ratified by the company. It was held by the Judicial Committee of the Privy Council that there was in fact no such ratification, but that it would have been competent for the company to ratify the loan and so bind the company.

It is not necessary for me, in the circumstances, to inquire what legal disabilities affect the directors by reason of the failure of the company to keep up the full number. If the company in general meeting authorize the petition, it will be their own act and not that of the directors. Indeed, the failure to maintain the directorate in its full strength may prove to be an additional reason for ordering the company to be wound up. I will reserve all questions of costs until the adjourned hearing, as I am satisfied that, though the directors have been mistaken in their rights, they acted bona fide and in the interests of the shareholders.

Solicitors for the company: *Blake & Kenny.*
Solicitor for the shareholders: *S. P. Redington.*

A. H. W.

(1) 2 A. C. 366.

Land Commission. (*Ross J.*) 1917.

MARY ANNE GIVAN'S ESTATE.

(E. C. 4047.)

Dec. 7, 21.

Express trust—Annuity—Lands charged in exoneration of other Lands—Redemption of Annuity—Real Property Limitation Act (3 & 4 *Wm.* 4, *c.* 27), *ss.* 2, 25.

By his will, made in 1770, A. M. devised all his estates subject to legacies to trustees in trust to pay certain legacies and annuities, and subject thereto to A. S. for life, with remainder in tail male to his first and other sons, with remainders over. By a first codicil deceased left to other trustees a sum of £20 per annum, payable out of the testator's lands of Grange, in trust for certain poor men and poor widows therein described. By a second codicil, deceased, having recited the devise in his will, revoked the remainders and limitations therein mentioned, and devised his freehold estates to A. S., his heirs, and assigns for ever, and in other respects confirmed his will and first codicil. A. S. predeceased the testator, leaving no issue, and on the latter's death his three daughters took as co-heiresses. A partition deed was executed in 1781 by them and their respective husbands, reciting (inter alia) the creation of the annuity of £20; and the lands charged therewith were thereby assured to M. (one of the daughters) subject to the said annuity.

In 1880 portions of the lands of the objector (the successor in title of M.) were sold in the Land Judge's Court in twenty-four lots, and lot 24 (being the lands now sold) was sold liable to pay the annuity in exoneration of the other lands; and by a Land Judge's conveyance lot 24 was conveyed to the purchaser subject to the annuity in exoneration of the other lands sold. In 1908 certain other lands belonging to the objector and derived from M. were sold, and, the annuity having been placed on the schedule with a denial of liability, the Commissioners of Charitable Donations and Bequests lodged an objection which was allowed; but the present vendors were not parties, and were ignorant of the application. The annuity was never paid at any time.

Held:—*First*, that the vendors not being parties to the decision given in 1908 were not bound by it. *Secondly*, that the annuity was secured by an express trust within the meaning of 3 & 4 Wm. 4, c. 27, s. 25, and consequently was not barred. *Thirdly*, that the words used in the second codicil only affected the devise to A. S., giving him an estate in fee instead of in tail. *Fourthly*, that it was immaterial that the trustees to whom the estate was devised, and those who were to distribute the annuity, were different persons. *Fifthly*, that the person whose money was applied in redemption of the annuity stepped into the shoes of the annuitant, and that therefore it was not necessary that the claim for contribution should have been made within six years from the date of the payment of the redemption moneys.

Land Commission. (*Ross J.*) 1917.

In re Givan's Estate.

Objection to final schedule of incumbrances.

By his will, made in the year 1770, Acheson Moore, of Ravilla, County Tyrone, devised all his estates subject to legacies to trustees in trust to pay certain legacies and annuities therein mentioned, and subject thereto to the use of Andrew Stewart for life, with remainder in tail male to his first and other sons, and with divers remainders over. By a codicil to his will, dated 30th January, 1770, the testator bequeathed to certain other trustees the sum of £20 per annum for ever, to be paid to the officiating clergyman of the Church of Mooretown, payable out of the lands of Grange, the said £20 yearly in trust for the use of six poor men and four poor widows of men who had been tenants of some parts of his estates in Tyrone or Monaghan, the same to be divided among them, a preference being always given to members of the Established Church, and to the poorest and most worthy of them, and to be continued from time to time to six poor men and four poor women, regard being always had to the poor of his own estate.

By a second codicil to his will, dated the 3rd February, 1770, the testator recited the said devise in his will to his said trustees in trust to pay the debts, legacies, and annuities in the said will mentioned, and subject thereto to Andrew Stewart for life, with remainder to his sons in tail male. He then goes on to say as follows:—"Now I, the said Acheson Moore, do hereby revoke, annul and make void all the said remainders and limitations of my said estate in the said will mentioned, and do hereby alter and make void my said will as to the limitations of my said real and freehold estates only, and do hereby devise and bequeath my said real and freehold estates to my said kinsman the said Andrew Stewart, his heirs and assigns for ever . . . And I do hereby in all other particulars confirm and establish my said will and the codicil by me made and annexed to the said will dated the 30th of January last in all points whatsoever as to the debts pecuniary legacies and annuities by me thereby devised."

Andrew Stewart predeceased the testator, and the limitations in his favour entirely failed.

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In re GIVAN'S ESTATE.

In a deed of partition made on 19th January, 1781, by the three daughters and co-heiresses of the said Acheson Moore and their respective husbands, the creation of the said annuity was recited. The lands so charged were thereby assured to one of his daughters Mary Malone and her husband, subject to the yearly rent or sum of £20 devised by Acheson Moore for charitable purposes as aforesaid.

The objector, Frederick Acheson Montgomery Moore, is the successor in title of the said Mary Malone to all the lands forming her share. In the year 1880 a portion of the said objector's lands was sold in the Land Judge's Court in twenty-four lots. Lot 24 was sold liable to pay the said annuity in exoneration of the other lands in the rental, and the other lands were sold subject to the annuity, but indemnified by lot 24. By a Land Judge's conveyance, dated 3rd February, 1880, lot 24, being the lands now sold in this matter, was conveyed to the purchaser subject to the said annuity of £20 in conjunction with other lands, and as to the lands thereby granted, subject to the said annuity in full exoneration of all the other lands sold or ordered to be sold in the said matter, but with such right and benefit of contribution from the other lands subject thereto, but not sold or ordered to be sold in the said matter, as then existed.

The annuity was never paid at any time. When other lands of the objector also derived from the said Mary Malone came to be sold, the annuity was placed on the Schedule with a statement denying liability, and an objection was lodged by the Commissioners of Charitable Donations and Bequests. That objection was heard on the 10th March, 1908, and was allowed with costs, on the ground that, there being an express trust, the Statute of Limitations did not apply, and on 30th March, 1908, an order was made fixing the redemption price at £480, which sum, with the costs of their objection, was paid to the Commissioners.

The objector objected to the omission from the final schedule of his claim for contribution against those interested in the estate in respect of the said annuity charged on the lands sold in this matter and other lands the property of the objector, which annuity was redeemed by the objector on the sale of his estate.

Vincent Rice, for the objector:—

Reading together the will and the first codicil, there is an express trust created by the testator in favour of the charity. The equitable owners of the estate, subject to the trust, partitioned the estate by the partition deed of 1781, charging this annuity on (inter alia) the lands now sold. The trustees were not parties to this deed, and the owners by their own act became trustees against their will, for the charity of which they had full notice. The trust involved the active duty of selection of the poor persons to be benefited, which duty the owners imposed on themselves by the partition deed. This brings the case within the exception indicated by Palles C. B., in his judgment in *Drake's Estate* (1). The decision in *Montalt's Estate* (2) therefore applies.

The second codicil only revokes the limitations and remainders of the estate, subject to the charity, and does not revoke the charitable annuity. This is clear from the wording of the second codicil, which only mentions the first codicil (which created the charitable annuity) for the purpose of confirming it.

The right of the objector to contribution from Givan's estate was not barred within six years from 1908 (the date of the redemption order in *Moore's Estate* (3)). The ordinary rule as to limitation of action as between contributories does not apply here. When the objector redeemed the whole of the annuity in 1908 he became a hypothetical purchaser of an annuity payable out of Givan's estate, equivalent to the amount which Givan's estate was liable to contribute in payment of the annuity. This is clear from the judgment of the House of Lords in *De Vesci* v. *O'Connell* (4). The objector, therefore, could not be barred until after the expiration of twelve years from 1908.

Chadwick, for the vendors:—

I submit that the annuity is barred. There never was any express trust securing it. Even if the express trust for payment of legacies and annuities created by the will could be held to extend to the annuity created by the first codicil, such trust was revoked by the second codicil, leaving the annuity secured by a

(1) [1909] 1 I. R. 136.
(2) [1909] 1 I. R. 390.
(3) Unreported.
(4) [1908] 1 I. R. 452.

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simple charge only. The principle laid down by Lord St. Leonards C., in *The Commissioners of Charitable Donations and Bequests* v. *Wybrants* (1) has been overruled by *Drake's Estate* (2), and by *Cunningham* v. *Foot* (3). The vendors being strangers to and totally unaware of the former decision of this Court in *Moore's Estate* (4), holding the annuity to be alive, it would be contrary to natural justice to hold them bound thereby. Moreover, the objector's claim is itself barred, inasmuch as it is one in the nature of a simple contract claim, and should have been brought within six years from the date of the order, which was equivalent to payment (Lightwood on the Limitation of Actions, p. 235: *Copis* v. *Middleton* (5); Halsbury, vol. xv, p. 522, § 983). The objector's only right is as a co-debtor under sect. 5 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), to any securities the annuitants might have against the vendors; there are in fact no such securities, the annuities being gone. The case does not come within the distinction suggested by Palles C.B., in *Drake's Estate* (6). Here there were trustees interposed between the trustees or owners of the lands and the charitable objects, and it was these trustees, who themselves became barred, that had the duty of selection imposed on them: see the final paragraph of Lord St. Leonards' judgment in *Wybrants' Case* (1), and the judgment of Wylie J., in *Montalt's Estate* (7).

Cur. adv. vult.

Dec. 21.

Ross J.:—

[His Lordship, having stated the facts as above set out, proceeded as follows:—]

The contention of those opposing the objection is that they are not bound by the decision on the objection made on the 10th March, 1908, that they had no notice of it, and had no opportunity of being heard. To that extent I agree with their contention. The entire matter must therefore be reconsidered.

(1) 2 Jo. & Lat. 182; 7 Ir. Eq. R. 580.
(2) [1909] 1 I. R. 136.
(3) 3 A. C. 974.
(4) Unreported.
(5) 1 Turn. & R. 224.
(6) [1909] 1 I. R. 136, at p. 146.
(7) [1909] 1 I. R. 390.

They further contend that the decision is erroneous, that it is overruled by the subsequent judgment of the Court of Appeal delivered on 21st December, 1908, in *Drake's Estate* (1), and that the annuity is barred by the statute. The annuity is certainly barred unless it is secured by an express trust. In *Drake's Estate* (1) Chief Baron Palles and the other members of the Court dissented from the views of Lord St. Leonards expressed in *The Commissioners of Charitable Donations* v. *Wybrants* (2). Lord St. Leonards was of opinion that when charitable gifts are charged on lands devised, persons taking these lands under the will take them under an express trust to pay the annuities. He says: "Who is to pay the annuities but the person who is liable to the burden? And this in the case of a charity impresses him with the character of a trustee for the charity." The Chief Baron refused to admit any such distinction in favour of charities. A charge simpliciter, whether in favour of an individual or of a charity, does not create a trust. But he says that a distinction might exist in case of a devise to poor persons to be selected by the devisee, or where the devise casts upon the devisee the duty of seeing to the application of the annuities to the specified charitable purposes.

A case illustrating the distinction came before Mr. Justice Wylie in the following year, 1909—*The Estate of the Earl of de Montalt* (3). The words relied on as creating an express trust were: "Such annual sum to be annually distributed by the possessor of the D. Estate for the time being for the benefit of the poor of the said parishes in such manner as such possessor shall think fit." Mr. Justice Wylie held that these words imposed a duty of a fiduciary character, and that therefore an express trust was created. In the present case we have words requiring a selection of the poorest and most worthy, and this is enough to create an express trust in respect of the annuity.

The next contention of the owner is that, assuming the creation of an express trust by the words used in the first codicil, the testator in the second codicil alters, annuls, and makes void his said will as to the limitation of the said real and freehold

(1) [1909] 1 I. R. 136. (2) 2 Jo. & Lat. 182; 7 Ir. Eq. R. 580.
(3) [1909] 1 I. R. 390.

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estates. It is contended that these words have the effect of removing the words creating the trust and leaving only the words creating the charge. I think, on reading the documents, it is plain that the annulment of the limitation is only intended to affect the estate devised to Andrew Stewart. What was an estate for life with remainder in tail is turned into a fee. To make this more certain he expressly confirms and establishes his will and codicil in all points whatsoever as to the debts, pecuniary legacies, and annuities devised.

A further point is made that the trustees to whom the estate was devised are not the same as the trustees who are to distribute the charitable annuity. Some support for this contention is to be found in the concluding words of the judgment of Lord St. Leonards. "It is not a case in which annuities were given to trustees for the charities and the estate itself subject to annuities given to other persons beneficially. If that case arises, it may be found more difficult to relieve the charities." On consideration of this matter I cannot see how in principle it makes any difference. The trustees to whom the estate came, or the parties who took under the partition deed, took with full notice of an express trust. It is true the trustees who were to receive and administer the charity appear never to have acted. Can those who took the estate contend that because the trustees of the charity never acted they are free from the burden? I think not. The annuity, secured by an express trust, is charged on the estate, and although those to whom the estate comes are not bound to administer the trusts, they are bound to raise the money, and pay it into the hands of those who are duly appointed to administer the trusts. When there are no trustees of the charity, the owner of the estate taking subject to the annuity secured by an express trust, cannot be allowed to say that the lands are not affected by the express trust.

One other point remains. It is contended that the claim for contribution must be made within six years after the redemption moneys were paid. But in equity the person whose money was applied in redemption of the annuity stepped into the shoes of the annuitant. It is not denied that this would be so where an incumbrance was paid off; but it is said that this is not

so in the case of the redemption of an annuity. I cannot see why. Authority to the contrary is to be found in the reasoning of the House of Lords in *De Vesci* v. *O'Connell* (1), and in particular in the judgment of Lord Atkinson (p. 462). "The owner of any portion of the indemnified land," he says, "who was compelled to pay any part of the fee-farm rent would have a right in equity to be recouped out of the issues and profits of the lands by which his own lands were indemnified." He then goes on to point out that when part of the fee-farm rent is apportioned on the indemnified land and redeemed, the owner of these lands, whose money redeemed this portion, would be entitled to have the indemnifying lands declared well charged in his favour with a sum equal to the redemption price.

The objection must therefore be allowed with costs, and, if the parties cannot agree, there must be an inquiry as to the amount of the contribution.

Solicitor for the objector: *C. H. Denroche.*

Solicitors for the vendors: *Longfield, Kelly & Armstrong.*

T. C. T.

(1) [1908] 1 I. R. 452.

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June 28. July 31.

ACHESON *v.* CAVAN RURAL DISTRICT COUNCIL (1).

Labourers Acts - Lands taken compulsorily—Erection of labourers' dwellings within specified time—Failure to make arrangements for erection of dwellings—Right of owner of lands compulsorily taken to re-conveyance—Labourers (Ireland) Act, 1883 (46 & 47 *Vict. c.* 60), *s.* 15.

The defendant council obtained a provisional order, dated the 24th July, 1912, authorizing them to acquire compulsorily for the erection of labourers' dwellings (inter alia) certain lands of the plaintiff, which order was confirmed by the Local Government Board on the 27th September, 1912. An executed deed of transfer of the plaintiff's lands was delivered to the defendants on the 19th December, 1913. On the 22nd January, 1914, the defendants issued advertisements inviting tenders for the erection of the dwellings, but received no tenders for the erection of the dwellings to be erected on the lands acquired from the plaintiff, and further advertisements, published on the 8th February, 1914, 4th March, 1914, and 6th January, 1915, also resulted in no tenders being made. An advertisement, however, published on the 5th February, 1914, asking for tenders for the fencing of the plaintiff's lands, produced a tender, and the fencing of the lands was completed in the month of April, 1914. No further steps were taken by the plaintiffs, and on the 18th February, 1816, the plaintiff issued an equity civil bill, claiming re-conveyance of the lands acquired from him.

On the hearing of a case stated, *held*, by the Court of Appeal (Ronan and Molony L.JJ., the Lord Chancellor diss.), that the defendants had failed to make arrangements for the erection of the dwellings within sect. 15 of the Labourers (Ireland) Act, 1883, and that the plaintiff was entitled to a re-conveyance.

Case stated by the Right Hon. Mr. Justice Madden, pursuant to the provisions of 52 & 53 Vict. c. 48, at the Spring Assizes, 1917, for the county of Cavan, as follows:—

This was an Equity Civil Bill brought by the plaintiff, claiming:—

(*a*) A declaration that the defendants hold two plots of land, containing one acre, statute measure, and forming part of the

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townland of Drumnalaragh, in the county of Cavan, as trustees for the plaintiff;

(*b*) An order that the defendants do re-transfer the said plots to the plaintiff;

(*c*) An inquiry as to what damages the plaintiff is entitled to by reason of the erection of a fence round said plots, and the use of said plots, by the defendants or their agents;

(*d*) Further and other relief.

(*e*) Costs.

The County Court Judge (1) made a decree granting the relief sought in paragraphs (*a*) and (*b*) of this Equity Civil Bill, the plaintiff abandoning his claim for damages. Against this decree of the County Court Judge the defendants appealed, and during the hearing of the appeal before me the following facts were proved or admitted:—

The plaintiff is registered as owner in fee-simple, and occupier of part of the lands of Drumnalaragh, entered at folio, No. 6499, of the Register of the County of Cavan.

By the Cavan Rural District Labourers Order, dated the 24th July, 1912, the defendants were authorized to acquire compulsorily, for the erection of labourers' dwellings, two plots of lands containing one acre, statute measure, forming part of the plaintiff's holding in the said townland of Drumnalaragh. The said order was duly confirmed by the Local Government Board on the 27th September, 1912. At a meeting of the defendant council on the 15th October, 1912, application was made to the Local Government Board for the appointment of an arbitrator, and the appointment being made, the arbitration inquiry was held on the 8th January, 1913. On the 13th March, 1913, the arbitrator issued his award allowing the plaintiff as occupier the sum of £8 14*s.* for his interest in the lands, the subject of this suit, and awarding the Irish Land Commission as owners the sum of £6 14*s.* The arbitrator made the following note as to apportionment of rent charges, "abate annuity by such sum as award will redeem."

By advertisement, dated 22nd March, 1913, and appearing in the local newspapers, the *Anglo-Celt* and *Irish Post*, in their issues

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of 29th March, 5th April, and 12th April, 1913, the defendants required a short abstract of title to the several plots acquired under the Cavan Rural District Labourers Order of 24th July, 1912, to be delivered to them on or before the 5th May, 1913. The plaintiff failed to furnish such abstract of title on or before the 5th May. By letter dated 15th May, 1913, defendants' solicitors applied to plaintiff's solicitors for said abstract, which was duly delivered on the 29th July, 1913. On the 2nd September, 1913, requisitions on title were sent to plaintiff's solicitors, and searches being bespoken by defendants' solicitors on the 3rd September were ready on the 22nd September, 1913.

The defendants, at the request of their solicitors, authorized the paying orders for the amounts set out in the arbitrator's awards to be issued at the meeting of the 18th November, 1913. A paying order, dated the 18th November, 1913, for £8 14*s.*, was issued to and subsequently received and acknowledged by the plaintiff; and a paying order of same date for £6 14*s.* was sent to the Irish Land Commission. The paying order to the Irish Land Commission was cashed on the 24th February, 1914; but the paying order to the plaintiff was not cashed up to the 20th July, 1915, on which date the auditor recommended it to be cancelled, which was duly done.

The defendants' solicitors on the 3rd November, 1913, wrote to plaintiff's solicitor enclosing deed of transfer for execution in exchange for which the paying order would be handed over. On the 1st December, 1913, application was made to the plaintiff's solicitor for the executed deed of transfer, and his attention was drawn to a resolution of the defendant council whereby it was ordered that unless the necessary steps were taken to have the transfer of (inter alia) the lands, the subject of this suit, completed on or before the 15th December, 1913, the compensation money would be lodged in Court. On the 19th December, 1913, the plaintiff's solicitor delivered to the defendants' solicitor the executed deed of transfer. On the 19th March, 1914, the Irish Land Commission, as registered owners of a charge on the lands of the plaintiff, released the lands, the subject of this suit from the said charge in consideration of the sum of £6 14*s.* 0*d.* received by them from the defendant council.

The defendants issued advertisements on the 22nd January, 1914, inviting tenders for the erection of cottages under the scheme, and no tenders were received for (inter alia) the erection of the two cottages on the land acquired from the plaintiff. Further advertisements inviting tenders were published on the 8th February, 1914, 4th March, 1914, and 6th January, 1915, but no tenders were received. In response to an advertisement, dated 5th February, 1914, the defendants received a tender from one James Gaffney, of Broomhill, County Cavan, to fence the plots acquired from the plaintiff. This tender was accepted, and the fencing of the plots was completed in April, 1914. The Local Government Board sanctioned a loan to the defendants of £11,560 for the carrying through of said scheme, and of this sum £6,000 has been advanced in three equal instalments of £2,000 each.

I held as a fact that the sanitary authority had not failed to make arrangements for the erection of labourers' dwellings on the said land, but that labourers' dwellings had not in fact been erected. I also held that the failure to have the dwellings erected in a reasonable time was not due to any default on the part of the defendants.

Wylie K.C. for the defendants contended that the plaintiff was not an owner of the two plots of land so as to be entitled to a re-conveyance, and in reply Murphy, for the plaintiff, offered to refund to the defendants the sum of £6 14*s.* 0*d.* paid by them to the Irish Land Commission.

It was contended on the part of the plaintiff that on the true construction of the 15th section of the Labourers Act, 1883, the fact that the labourers' cottages had not been erected precluded me from finding that the defendants had made arrangements for the erection of the cottages, inasmuch as the word "arrangements" in the said section ought to be construed as meaning "successful arrangements." I agree to state a case for the opinion of the Court on the question whether such was the true construction of the section.

Unless I am in the opinion of the Court precluded from so holding, I am to be taken as holding that the defendants had not

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failed to make arrangements within the meaning of the said section.

The questions for the decision of this honourable Court are :—

(1) Is the plaintiff "owner" of the two plots of land, the subject of this action, so as to be re-entitled to a re-conveyance under section 15 of the Labourers (Ireland) Act, 1883?

(2) Was I at liberty to hold that the defendants had not failed to make arrangements for the erection of labourers' dwellings on the lands within the meaning of the 15th Section of the said statute?

If the first question is answered in the affirmative, and the second in the negative, the decree of the County Court Judge is to be affirmed with costs.

If the first question is answered in the negative, or the second in the affirmative, the decree is to be reversed with costs.

E. S. Murphy, for the plaintiff.

T. A. Finlay (*Wylie K.C.* with him), for the defendant.

Cur. adv. vult.

SIR IGNATIUS J. O'BRIEN C. :—

Three questions arise for decision in this case, and a decision on any one of them in favour of the District Council would be a sufficient answer to the plaintiff's claim. These three questions which are involved in the construction of sect. 15 of the Labourers (Ireland) Act, 1883, are as follows :—(*a*) What amounts to failure to make arrangements within the meaning of the section; (*b*) what would amount to making arrangements; and (*c*) whether on the true construction of the section the plaintiff in the civil bill is a person who is entitled to have land re-conveyed to him?

The dates of the various steps which were taken in the matter, and which appear in the case stated by Mr. Justice Madden, are most important to bear in mind. To some extent they are typical of almost any case that could arise under the section, and are illustrative of the delay which is sometimes bound to arise between the date of the confirmation of the provisional order and that of the actual contract to erect the cottages. In a case which came before

us, *Fee* v. *Ballymahon Rural District Council* (1), the question at issue in the present case was mentioned. In that case the preliminaries had occupied a period almost covering the whole interval between these two dates; but the case was disposed of on another point, namely, whether the acquisition of land by a district council for a term of years came within sect. 15. The actual point now before us for determination was not decided by Mr. Justice Kenny; and in my judgment in this Court I refrained from expressing any opinion as to whether the facts disclosed would constitute a failure to make arrangements for the erection of labourers' dwellings within the meaning of the section if it had applied.

The provisional order in this case was confirmed on September 27th, 1912; the council met on October 15th, 1912, and applied for the appointment of an arbitrator; the arbitration inquiry was held on January 8th, 1913; the award was made on March 13th, 1913, the plaintiff being allowed as occupier £8 14*s.* for his interest in the lands, and the Land Commission as owners £6 14*s.* The annuity payable to the Land Commission was directed to be abated by such sum as the award would redeem. Six months were occupied in carrying out these preliminaries. There was no delay in publishing the necessary advertisements, which appeared in the local newspapers on March 22nd and 29th and April 5th and 12th; and the defendants required a short abstract of title to this and other plots to be delivered to them before May 5th, 1913. The plaintiff did not actually furnish the abstract of title until July 29th, and so two further months passed. For that delay the defendants are not responsible; but the judge does not find whether the plaintiff was to blame. About a month later, on September 3rd, requisitions on title were furnished, and there was a further delay till September 22nd, waiting for the result of the searches required. Paying orders for the amounts set out in the arbitrator's award were issued on November 18th, 1913, and on that date an order for £8 14*s.* was sent to the plaintiff, and duly acknowledged by him, but down to July 20th, 1915, no step had been taken by him to cash it. On November 3rd, 1913, the plaintiff was furnished with a deed of transfer for execution; a

(1) 49 I. L. T. R. 32.

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month passed and it was not executed, nor was it until a further request was made that it was delivered on December 19th, 1913. The Land Commission did not release their charge on the lands until March 19th, 1914; but the defendants very properly issued advertisements on January 22nd, 1914, inviting tenders for the erection of the cottages. Further advertisements inviting tenders were issued on February 8th, 1914, March 4th, 1914, and January 6th, 1915. It will thus be seen that about a year and four months of the time referred to in sect. 15 had elapsed, without any default of any kind on the part of the Rural District Council, and that prima facie there was to some extent substantial delay before the plaintiff furnished his abstract of title. It is not, however, essential to consider, in my view of the case, whether or not the plaintiff himself was a defaulter.

The construction put by the plaintiff's counsel on the section is perfectly simple. Excluding fraud or any element of that kind his argument is that failure to make arrangements is failure in fact, whether such failure was or was not due to any wilful act or omission by the district council. The effect of this argument is that there would be failure although it might be practically impossible for a district council to obtain tenders, or if that was not enough, to obtain a contract within the two years. In this case, however, a tender was received from a man named James Gaffney to fence the plot acquired from the plaintiff, but no tenders were received for the erection of the cottages. The judge has found, as a fact, that the failure to have the dwellings erected in a reasonable time was not due to any default on the part of the defendants, from which I am at liberty to infer—and do infer—that he found it was no fault of theirs that the cottages were not erected, or that a contract was not obtained for the erection of them. Of course it is a matter of public notoriety which in a proper case I would be entitled to take into consideration that once the present war broke out advertising for tenders on the basis of the scale allowed in pre-war days for the erection of these cottages could not produce any result. Here, however, the two years mentioned in the section expired on September 27th, 1914, so that in a general way as part of the facts in the case what was done after that date does not affect the question in the particular matter before us.

In the second question submitted to us there are really two questions involved, namely—(*a*) What is the meaning of failure? and (*b*) What is the meaning of making arrangements? I understand the learned judge to have held that there was no wilful failure, or, as he puts it, no default on the part of the defendants.

As to the second question, the findings of the learned judge do not in exact terms cover the point which was argued before us; but it is quite evident that he considered that the making of arrangements did not necessarily mean the completion of the cottages. He does not, however, say in terms what view he took as to what would amount to making arrangements; but this question has been fully argued before us.

The third question which is the first in the case stated is in the following form:—"Is the plaintiff 'owner' of the two plots of land the subject of this action so as to be entitled to a re-conveyance under sect. 15 of the Labourers (Ireland) Act, 1883?" The word "owner" does not occur in the section, but it is manifest that it was used by the learned judge in connexion with a decision of his own in *In re Parkinson* (1). In that case he discussed the incorporation of the Lands Clauses Acts with the Labourers Acts and held that the Land Commission were owners of a separate estate which should be the subject of distinct compensation. Counsel for the respondents contended that the plaintiff in the present civil bill was not an owner to whom a re-conveyance could be made, because the Irish Land Commission were one of the owners, and there could be no means of reconveying to them. The plaintiff offered to refund to the defendants the £6 14*s.* paid by them to the Land Commission, but it was contended on behalf of the Rural District Council that while they would be recouped under that offer the land could not be given back in the position it was before the compulsory purchase; and in that they are quite right, because an order in favour of the plaintiff alone would not have the effect of restoring the land subject to the annuity. Moreover if "a person" in the section means owner; and if one of the owners does not want his interest in the land back the section would hardly apply.

(1) [1898] 1 I. R. 390.

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The first of the questions in the order in which I have taken them does not, I think, require any lengthened consideration. If the words "have failed" are to be taken irrespective of the conduct of the district council the plaintiff is, of course, so far right; but if the failure contemplated is such as in Mr. Justice Madden's opinion the section intended, no one could possibly come to any other conclusion than that at which he arrived. It is not unreasonable to assume that the Legislature, when it was dealing with statutes relating to the compulsory acquisition of lands on the confirmation of a provisional order, contemplated that a considerable delay might take place, through no fault of the council, before the cottages could be erected; and that if there was not something in the nature of misconduct, gross carelessness, or wilful neglect on the part of the council there would not be a failure within the meaning of the section.

Authorities are not of much assistance in a case of this kind. A question like that before us must depend on the terms of the Act of Parliament to be construed, or the nature of the contract under which the consideration of failure becomes an essential matter. Three cases—one on a contract, and two on the construction of statutes—were referred to. In *Loates* v. *Maple* (1), which came before Wright J., a contract provided that if the plaintiff, who was a jockey, "should fail to procure a licence" within a certain time the agreement should be at an end. He did not, in fact, procure the licence; but this failure was not due to any fault of his, because he had applied for the licence, but the stewards did not grant it, as he was not able to ride at that time. In accordance with their suggestion he applied again and was granted the licence, but it was then too late to fulfil the contract. The learned judge found that the plaintiff was entitled to recover, and that he had not "failed to procure a licence." *Brotherton* v. *Metropolitan and District Joint Committee* (2) was a case on a section of the Railways Regulations Act, 1889, which provided that if a passenger "failed to produce" a ticket showing that his fare was paid, an officer of the company might detain him. There was no doubt that the passenger, the plaintiff, did fail to produce a ticket, and that the non-production of it was due

(1) 88 L. T. 288. (2) 9 T. L. R. 645.

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to the fact that the ticket had got into a hole in the corner of his pocket. The learned Judge, at the trial considered, as a matter of law, that there was a failure to produce a ticket. The King's Bench Division held that there was a question for the jury. The case was complicated by some other facts, so that it is not a very clear authority. On the other hand, in *Miedbrodt* v. *Fitzsimon* (1) the Privy Council held that the word "failed" in sect. 67 of the Merchant Shipping Amendment Act did not imply wilful default. They considered that this view was justified by the provision which threw the expense of landing the cargo upon the shipowner, and the general position in law making the payment of freight, and the delivery of the goods, concurrent acts. This is a clear decision on that particular section; and, if I may say so, it would appear to me to be right, as was also, I think, the view the other way, in the case of contract and the railway passenger case.

There are two possible constructions of sect. 15 of the Labourers Act, 1883: one which would, to my mind, unreasonably affect district councils in the carrying out of a great public duty; and another, quite consistent with the section, which would prevent such a result. The reasonable view of the section, as I read it, is that if the Council have done everything which humanly they could have done, and, if during part of the time, at any rate, it was not possible to make any progress owing to the acts or omissions of the plaintiff himself, there is not a failure to make arrangements. It is said, however, that this construction would practically give no effect at all to the section. That is not so. I think that a district council may act within the two years in such a way that a judge or jury would say that they had acted either wilfully and carelessly, or had shown that they did not honestly mean to carry out the Act at all, in which event the person named in the section might be able to enforce the right given. If I be right in the view I have taken the plaintiff's case fails; and the answer to the second question in the case ought to be "yes"; and it would also be "yes" if they had made arrangements. As I have said the case is not, upon this aspect, quite satisfactory.

It could scarcely be contended, nor indeed was it contended, that, if a contract had been entered into, arrangements had not been

(1) L. R. 6 P. C. 306.

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made, but why should that be taken as the sole test? Why should not the acceptance of a tender be sufficient although no contract might be entered into until after the expiration of the two years? During the arguments I put the following case which, I consider, tests the true meaning of the section. If just before the termination of the two years a contract was made, and if two days after the contractor became bankrupt, and by repudiation on the part of the assignee the contract lapsed, why should it be held in that case that arrangements were made, while in a case where the two years expired between the receipt of a tender and its acceptance (or if the test be contract the actual sealing of the contract) it could not be held that arrangements had been made? This inconsistency must exist unless a flexible construction be given to the section. The true solution, in my opinion, is not to endeavour to find some subtle distinction between what is making arrangements and what is not, but by making the whole section depend upon failure, that is to say, wilful or blamable failure.

The third question I have put at the outset. The first in Mr. Justice Madden's case does not really require to be answered if I be right in the view I have taken of the section on the second question submitted to us. However, I may say that it appears to me not reasonable to read "person" as occupier simply. The words are: "person from whom the same was acquired, his heirs or assigns," so that, manifestly the section means some person from whom title was obtained. Does it mean only one of those from whom title was obtained or, in this case, only one of the two persons from whom the land was acquired? No doubt the expression "land" in the Labourers Acts is used as indicating the physical piece of ground on which a cottage is to be built, but I adopt the decision of Mr. Justice Madden in *In re Parkinson* (1898) (1) that the Land Commission have also an estate which has to be acquired, and that if there is to be a re-conveyance it must be a re-conveyance which will replace the parties in the same position that they occupied prior to the compulsory purchase. As the plaintiff is only one of the persons from whom the land was acquired, he cannot insist upon his interest being re-conveyed to him or on utilizing the section to separate, in future, this part

(1) [1898] 1 I. R. 390.

of the holding from the rest out of which the annuity would continue to issue. This certainly is my view, but I do not feel called upon to answer the question, especially having regard to the fact that counsel who had argued it below was unavoidably prevented from arguing the case here. It appears to me quite sufficient, for the purposes of the case, to answer the second question in the case stated.

RONAN L.J.:—

In this case the plaintiff, who in some of the documents is called "the occupier," is the registered owner in fee simple of the lands in question. The question in the case turns on the construction of a few lines of sect. 15 of the Labourers (Ireland) Act, 1883:—"If within two years after the confirmation of any provisional order under this Act the sanitary authority have failed to make arrangements for the erection of labourers' dwellings, the said land shall, in case the person from whom the same was acquired, his heirs or assigns, so requires, be re-conveyed to him or them . . . at the price paid for the same by the sanitary authority." Now, it is to be observed that the words are not . . . if the sanitary authority "shall have failed to erect" the dwellings, or "shall have failed to make successful arrangements" for the erection of the dwellings, but are simply "have failed to make arrangements for the erection of labourers' dwellings." Having regard to this wording of the section, I have some difficulty in following the statement of the case by Madden J. Having stated the facts of the case, the learned judge proceeds to say:—"I held as a fact that the sanitary authority had not failed to make arrangements for the erection of labourers' dwellings on the said land, but that labourers' dwellings had not in fact been erected. I also held that the failure to have the dwellings erected in a reasonable time was not due to any default on the part of the defendants." . . . "It was contended on the part of the plaintiff that on the true construction of the 15th section of the Labourers Act, 1883, the fact that the labourers' cottages had not been erected precluded me from finding that the defendants had made arrangements for the erection of the cottages, inasmuch as the word 'arrangements' in the said section ought to be construed as meaning 'successful arrangements.'"

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That is an intelligible proposition put forward by the plaintiff—that "arrangements" means "successful arrangements." What does the learned judge say? "I agreed to state a case for the opinion of the Court on the question whether such was the true construction of the section." Now, I have not the least doubt, and the Lord Chancellor has no doubt, that that is not the true construction of the section. I am disposed to think, on reading this case stated, that the questions really intended to be stated by Madden J., were whether, on the true construction of the section, "arrangements" meant "successful arrangements" and whether the non-erection of the dwellings in fact precluded the learned judge from finding that they had made "arrangements." He says, "Unless I am, in the opinion of the Court, precluded from so holding, I am to be taken as holding that the defendants had not failed to make arrangements within the meaning of the said section." The question that appears to be involved in this is whether the sanitary authority can only prove they made "arrangements" within the meaning of the section by establishing that the "arrangements" made resulted in the actual erection of dwellings. In my opinion "arrangements" in this section means "arrangements," and does not mean "successful arrangements." It means "arrangements" in fact. I am glad to be fortified in this opinion by the view taken by the Lord Chancellor; and I do not gather from the case stated that Madden J. had affirmatively expressed a contrary opinion on this point. The case really turns on the meaning of the single word "fail." What does "fail" mean? In searching for instances where this word has been used, it occurred to me to turn to the rules of the Supreme Court, where, having regard to the careful draftsmanship of the rules, and their successive re-enactments after reconsideration, one might expect to find, if anywhere, accurate legal phraseology. In Order 13, rule 3, of the rules of the Supreme Court, dealing with default of appearance, it is provided, "where the writ of summons is indorsed for a liquidated demand, whether specially or otherwise, and the defendant fails, or all the defendants, if more than one, fail, to appear thereto, the plaintiff may enter final judgment," &c. In this rule the words "fails to appear" mean "does not appear." No

one has ever suggested that in order to obtain judgment by default the plaintiff must establish that the failure to appear was owing to negligence, or anything of that sort. The words are "fails to appear" in the plainest language. Similar words are to be found in other of the rules. Take Order 27, dealing with default of pleading, as Order 13 deals with default of appearance. Rule 1 of Order 27 provides:—"If the plaintiff, being bound to deliver a statement of claim, does not deliver the same within the time allowed for that purpose, the defendant may, at the expiration of that time, apply to the Court or a judge to dismiss the action with costs." So that the words "does not deliver" are used in precisely the same way as the words "fails to appear" in the former rule. They simply point to the non-doing of the particular act. So again in rule 2 of Order 27, "If the plaintiff's claim be only for a debt or liquidated demand, and the defendant does not, within the time allowed for that purpose, deliver a defence, the plaintiff may, at the expiration of such time, enter final judgment for the amount claimed, with costs." That is precisely analogous to rule 4 of Order 13. In rule 3 of Order 27 the wording is changed again. "When in any such action . . . there are several defendants, if one of them make default as mentioned in the last preceding rule, the plaintiff may enter final judgment." Passing to the rules dealing with discovery, we find in rule 21 of Order 31:—"If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment." Although the language varies slightly in these several rules, it is clear to my mind that in each case it is the non-doing of the particular act that leads to the result provided for. The case of *Miedbrodt* v. *Fitzsimon* (1), referred to by the Lord Chancellor, is to the same effect, and, finally, as pointed out by Mr. Finlay in his able argument, in sect. 4 of the Labourers (Ireland) Act, 1891, portion of the same code, we find this same word "fail" used in the primary sense of an omission to do a particular act. The effect of the appointment of the arbitrator under the Railways (Ireland) Act, 1851, is equivalent to the service of the notice to

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treat under the Lands Clauses Act. The award was made on the 13th March, 1913. There was nothing to prevent the council from making arrangements for the erection of the cottages. The delays as to matters of title and conveyancing only affected the right to receive the purchase-money. The land was assured to them. Not only could they have made arrangements for the erection of the cottages, but under sect. 24 of the second schedule to the Housing of the Working Classes Act they could, on making the deposit therein mentioned, have proceeded with the actual erection of the cottages. I, therefore, see no reason whatever for refusing to give the words "fail to make arrangements" their usual and primary sense. In these circumstances, I am of opinion that there is no evidence that any arrangement, successful or unsuccessful, was made by the council for the erection of the cottages. They took the first step towards the making of such an arrangement by asking for tenders. It cannot, in my opinion, be held that asking for tenders for doing a job is making an arrangement for doing it. Making a contract or accepting a tender for the erection of the cottages would, in my opinion, be an arrangement within the section, although the cottages were not erected or commenced within the two years.

I now come to the further question of the right of the plaintiff to a re-conveyance. In dealing with this, I think that sect. 15 must be read together with the last paragraph of sect. 16, which says, "Any lands . . . not required for the purpose for which they were acquired shall except where otherwise expressly provided by this Act, *in case the person from whom such lands were acquired, his heirs or assigns, so require, be reconveyed to him or them.*" The words in italics are identical with the words of sect. 15, and, therefore, apply not only to cases where the "arrangements" have not been made, but, carefully read, to the far wider and more important question of superfluous lands, as to which elaborate provisions are made under the Lands Clauses Acts. At first sight these words I have read would appear to apply only to lands acquired from a single owner in fee, free from charges and incumbrances. This, however, would be an absurd construction. Both provisions are plainly intended to apply to all lands acquired under the Act. It would be ridi-

culous to suggest that the superfluous lands are only those acquired from a single person who is absolutely entitled thereto. Persons are to be entitled to repurchase the lands at the price paid for them, and the lands are to be re-conveyed to them; but it would be absurd to hold that this means that a conveyance is to be made to all the persons having any interest in the lands jointly on joint payment of the aggregate purchase-money of the various interests. That is an impossible construction.

It seems to me then that the only possible construction is to be arrived at by applying the principle running through all the Lands Clauses Acts, as explained and adopted by Madden J. in *In re Parkinson* (1), i.e. that each interest in the lands is to be taken and dealt with separately. Applying this principle to the present statute, I think the effect is that each person who sold something to the council is entitled to re-purchase the same thing at the price he got for it, both in the case of superfluous lands and in the case where there was a failure to make arrangements within a limited time. It must follow then that the reconveyance in the present case would be to the plaintiff to hold subject, in common with the residue of his holding, to the entire of the annuity, because this is what he sold to the council. Our present duty is, however, confined to answering the questions put in the case stated; but probably Madden J. in drawing his affirmance of the decree will vary the relief granted to meet the views of the Court as now expressed. As I have said, the key to the section is to be found in the decision of Madden J. in *Parkinson's Case* (1), and it will be observed by anyone reading that case that it was a matter of considerably greater difficulty to apply this principle of dealing separately with the separate interests in the lands in *Parkinson's Case* (1) than in the present.

I wish to add that, in my opinion, there is nothing harsh or unreasonable in holding that the words "have failed to make arrangements" bear their ordinary meaning in this case. The period of two years after the confirmation of the provisional order is a long time. Before the council ask for a provisional order they should see that the situation of the lands and the circumstances of the district are such that they could erect the dwellings

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within a reasonable time; and if they are not able to make a contract for the erection of the dwellings at the end of two years from the confirmation of the order, there is nothing unreasonable in saying that the parties from whom the lands were acquired must get back their lands.

In my opinion the first question (in which Madden J. uses the word "owner," a matter which does not arise) ought to be answered as follows:—"The Court is of opinion that the plaintiff is entitled to have re-conveyed to him the interest in the lands which he conveyed to the council, that is to say the plot of land subject in common with the rest of his holding to the annuity."

As to the second question, I do not think that Madden J. intended to hold more than this, that successful arrangements had not been made; this enables us to answer the real question in the case by saying that the learned judge was not at liberty to hold that the defendants had not failed to make arrangements for the erection of labourers' dwellings, for there was no evidence of any arrangements having been made, and there being no such evidence, this question must be answered in the negative.

MOLONY L.J.:—

I agree with the judgment of Ronan L.J., although for a considerable time I was in some doubt as to the meaning of the word "fail" in sect. 15. It might prove convenient if we could hold that the word implies wilful or deliberate failure—something that could have been avoided by the action of the defendants themselves; and I confess that for some time I was in favour of adopting this construction. I am unable, however, to do so, having regard to the case of *Miedbrodt* v. *Fitzsimon* (1). The words of the clause there in question are practically the same as those we have now to consider; and the contention now put forward, that the word "fail" implies wilful default, is clearly opposed to the view of the Privy Council.

[His Lordship referred to the judgments, and continued.]

In the present case, whether the defendants are or are not to blame, they have not been able to comply with the provisions of

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the section. I agree with Lord Justice Ronan that "arrangements" means arrangements in fact made, and that if the defendants had been able to point to an accepted tender or contract for the erection of the dwellings, that would have been a sufficient compliance with the terms of the section. Unfortunately, however, there is no evidence whatever of any arrangements having been made, and, consequently, I have no doubt that the second question must be answered in the negative.

The first question involves a greater difficulty: In *In re Parkinson* (1) it was decided that where lands are held registered in fee-simple, subject to the payment of an annuity to the Land Commission, there are two separate interests subsisting in the lands—first, the annuity subsisting as one interest in the lands; and, secondly, the lands themselves, subject to the annuity. It is clear that "the person" referred to in sect. 15, "the person from whom the same"—the land—"was acquired," is not in this case the Land Commission and the plaintiff, but is the plaintiff alone; and he can only require under the section to have re-conveyed to him that which he himself conveyed. This is implied in the use of the word "re-convey." The word "owner" in the first question is, perhaps, ambiguous. The answer to this question will be that the plaintiff, as the person from whom the land was acquired, is entitled to have a re-conveyance of the interest which he conveyed to the council at the price paid for the same. He certainly is not entitled to have conveyed to him a greater interest than that which originally passed from him at the time of the transfer. This answer will enable the learned Judge to make up his order subject to some modification as regards the affirmance of the decree below. Speaking for myself, I should have been glad if I could have adopted the view taken by the Lord Chancellor, but I find it impossible to do so. I know something of the difficulties which these public bodies meet with in putting the necessary machinery in force within the prescribed time. Sometimes circumstances are too strong for them; sometimes they are themselves to blame. On the whole, however, seeing that if the Council enters into a binding agreement for the erection of the dwellings within the prescribed time,

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they sufficiently comply with the provisions of the statute, I agree with Lord Justice Ronan that there is no hardship in placing a literal construction upon the wording of the section.

Solicitor for the plaintiff: *W. J. Fegan.*

Solicitors for the defendant: *H. P. Kennedy & Co.*

R. ST. J. C.

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(1916. No. 205.)

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Jan. 21.
Feb. 8, 9, 21.

Limitations, Statute of—Realty—Infant—Bailiff—Mortgagee in possession—Express trust—Mistake of Law—Mortgagee of tenant for life overholding—Account of Rents and Profits—Plea of compromise and plene computavit.

Defendant was entitled, under the will of her father F., to a paramount equitable charge upon lands devised to her brothers, who by two legal mortgages mortgaged some of the lands, which were subject to the charge, to defendant to secure money due to her. In 1895, by agreement with her brothers, defendant entered into possession of the lands for the purpose of paying herself arrears of interest, and current interest, on the paramount charge and on the two mortgages. She applied the rents and profits in payment of the interest on the charge, which was always paid in full, and the surplus rents and profits towards paying the interest on the two mortgages, for which purpose they were not sufficient. In 1904 the surviving brother died. All the parties believed that the brothers had been seised in fee of the mortgaged lands, and as the interest on the mortgages was largely in arrear the defendant was allowed to continue in possession under that mistaken belief until June, 1914, when it was discovered that the defendant's brothers had been entitled for life only, and that the plaintiff, who was defendant's nephew, under F's will had been entitled in fee in remainder since 1904.

In 1904 plaintiff was an infant; but defendant was not his guardian, and did not stand in a fiduciary relation towards him. He came of age in 1908, eight years before the bringing of the action. When the mistake was discovered defendant gave up possession of the mortgaged lands; and vouched at the request and to the satisfaction of plaintiff's solicitor an account showing an agreed balance due by her. The account was furnished and vouched on the basis that she was accountable for surplus rents misapplied during the preceding six years. Plaintiff, becoming dissatisfied with the basis of the account, now sought to make defendant accountable for the surplus rents for the preceding eleven years from 1904. Defendant pleaded, inter alia, the Statutes of Limitations, compromise, plene computavit.

Held (1), that defendant was accountable for the preceding six years only; (2) that defendant was not accountable as mortgagee or chargeant in possession in respect of the surplus rents misapplied; and (3) that, in any event, plaintiff was bound by the vouched account shewing an agreed balance due by defendant.

Lockey v. *Lockey*, Ch. Prec. 588; *Hickman* v. *Upsall*, 4 Ch. Div. 144; and *Baxter* v. *Hozier*, 5 Bing. N. C. 288; discussed and applied.

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ACTION for an account of the rents and profits of the lands of Normansgrove, in the County of Galway, and of the lands of Ballymihill, in the County of Clare. The writ of summons in the action was issued on 1st March, 1916. The rents of Normansgrove in recent years, before a sale to the Congested Districts Board, were about £90 gross, or £60 net, after deducting tithe, rates, &c. The rents of Ballymihill were about £30 gross, or £25 net; total about £120 gross, or £85 net. The plaintiff alleged that the defendant, being his paternal aunt and being trustee for him under the will of his grandfather, John Forster, entered on these lands in 1904, when he was an infant, and had remained in possession as trustee or bailiff for him, and claimed an account against her as such trustee and bailiff since the date of the accruer of his title in 1904. The plaintiff attained age on 23rd June, 1908. The defendant put several defences on the file. She pleaded that the rents and profits were received by her under a mistake of law on the construction of the will of John Forster. She also alleged that the plaintiff, with knowledge of all the facts and being fully advised, acquiesced in her possession, and pleaded laches and acquiescence. She also pleaded the Statute of Limitations, as, at all events, limiting the plaintiff's claim to six years' arrears. There was a plea of compromise and plene computavit, such a plea, it was alleged, being established by showing that the defendant had rendered an account to the satisfaction of the plaintiff, or an account showing an agreed balance. Defendant claimed that in July and August of 1915 she did both these things. During the progress of the case Mr. Leech K.C., in his opening statement, put forward as a basis of plaintiff's action a claim for an account against defendant as a mortgagee and chargeant in possession of the lands. No such case was made in the writ or statement of claim, and counsel asked for leave to amend. Barton J. allowed the amendment on terms (see judgment).

The plaintiff was a grandson and the defendant a daughter of one John Forster, who died in 1869, leaving, among other children, three sons, Robert Burke Forster, John Burke Forster, and Francis Forster, and two daughters, Margaret and the defendant Minnie. By his will he left a legacy of £400 to defendant, and he charged the lands of Normansgrove and Ballymihill with

£1000 in favour of his daughter Margaret and of the defendant. He devised the lands of Normansgrove and Ballymihill, subject to that charge, to his son Robert Burke Forster, with a limitation, in the events that happened, to his other two sons, John Burke Forster and Francis Forster, as tenants in common, in language which it was assumed by the family, until a recent decision of the Court of Appeal in June, 1914, to the contrary, gave estates in fee to them. The testator named his three sons and the defendant executors and executrix. Robert Burke Forster alone took out probate, the right being reserved to the others.

After John Forster's death, in the year 1880, while Robert Burke Forster was in possession of these lands, the defendant demanded her £400 legacy from the acting executor, and her sister Margaret advanced £550 to him; and two mortgages, dated respectively the 20th of September, 1880, were executed, in which the three brothers joined, purporting to mortgage the fee of Normansgrove to the defendant as security for these sums, with interest at 5 per cent. Margaret died, and the defendant became entitled to the whole of the charge of £1000 and to the whole of the mortgages for £950. As regards her charge, she was entitled to £500 in her own right and £500 as administratrix of her sister. The parties beneficially entitled to the latter £500 were five persons to £100 each, and one of the persons was the defendant (who was, therefore, entitled to £600 of the charge beneficially); and the plaintiff and three other persons who were not before the Court were entitled to the remaining £400. The interest on the charge, which was the first and paramount incumbrance on both Normansgrove and Ballymihill, was £50 a year, and the interest on the mortgages, which were on Normansgrove only, was £47 10*s.* a year. The net rental of both sets of lands was only about £85, and the interest on the charge and mortgages amounted to about £97 10*s.* The rents were amply sufficient to pay the interest on the paramount charge, which had been paid in full as appeared by two orders of the Master of the Rolls dated in 1914 and 1915 respectively, but were insufficient to pay the interest on the mortgages, and in 1895 large arrear had accumulated. Robert Burke Forster died in 1892, and the two brothers, John Burke and Francis, were in possession. With their consent, the defendant

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in 1895 entered into possession and receipt of the rents and profits of the lands for the purpose of paying off said arrears and accruing interest on said mortgages and charge, but the rents and the profits were never sufficient for the purpose of paying the interest on the mortgages in full.

In 1904 John Burke Forster died, leaving the plaintiff, his only son, then aged seventeen, residing in England with his mother, who was his guardian. He and his mother took the advice of Messrs. Tippetts, London solicitors, who entered into correspondence with Messrs. Burton, defendant's solicitors. Serjeant Campion had advised that the two brothers had taken estates in fee under John Forster's will, and that opinion was placed before Messrs. Tippetts. They were also referred to the agent and the ex-agent of the lands. They were informed of the facts and acquiesced in counsel's opinion; and as it was clear that on the basis of that opinion the plaintiff as heir-at-law of his father had succeeded to a damnosa hereditas, they dropped the matter, and the defendant continued in possession, paying herself the interest on her charge out of the two sets of lands, and the interest of her mortgages, so far as they went, out of the lands of Normansgrove until June 3rd, 1914, when, upon an originating summons taken out by the defendant on a point of title the Court of Appeal held that John Burke Forster had not been owner in fee of these lands, but tenant for life with remainder to plaintiff, that plaintiff had been owner in fee of the lands since 1904, and that defendant's mortgages only bound the life estate of John Burke Forster.

Leech K.C. (with him *Leet*), for the plaintiff:—

The plaintiff claims an account against the defendant from the accrual of his title in 1904, she having at that date entered into possession of the lands now in question when he was an infant: *Burdick* v. *Garrick* (1); *Dormer* v. *Fortescue* (2); *Thomas* v. *Thomas* (3); *Hicks* v. *Sallitt* (4). The Statute of Limitations does not apply, and at any rate under the terms of John Forster's will the defendant is an express trustee: Lewin on Trusts, pp. 709,

(1) L. R. 5 Ch. Ap. 233.
(2) 3 Atk. 123.
(3) 2 K. & J. 79.
(4) 3 De G. M. & G. 782.

1108, 1119: *Heath* v. *Henly* (1); *Sheldon* v. *Weldman* (2). See *Pelly* v. *Bascombe* (3); Lightwood on Time Limit of Actions, pp. 215, 216; Darby & Bosanquet's Statutes of Limitation, p. 6; *Graham* v. *Chambers* (4); *Re Codd & Petitt* (5).

Alternatively we say the plaintiff claims against the defendant as mortgagee or chargeant in possession of the lands who must account from the date she went into possession as such mortgagee or chargeant: 19 Halsbury, p. 102, Art. 185; *Hickman* v. *Upsall* (6); *Hood* v. *Easton* (7); *Parkinson* v. *Hanbury* (8). There has not been any laches or acquiescence on the part of the plaintiff, and the defence of compromise and plene computavit fails. Any mistake that occurred was a mistake of fact and not of law: *Dunnage* v. *White* (9); *The West London Commercial Bank* v. *Kitson* (10); *Lawton* v. *Campion* (11); *Soper* v. *Arnold* (12); *Cooper* v. *Phibbs* (13); *Harris* v. *Harris* (14); *Denys* v. *Shuckburgh* (15); *Rhymney Railway* v. *Brecon & Merthyr Tydfil Railway* (16); *Duke of St. Albans* v. *Shore* (17); *Mersey Steel and Iron Company* v. *Naylor, Benzon & Company* (18); *Earl Beauchamp* v. *Winn* (19); *Daniell* v. *Sinclair* (20); *Fane* v. *Fane* (21); *Stewart* v. *Stewart* (22); *Walker* v. *Symonds* (23).

Rosenthal K.C. and *Byrne*, for the defendant:—

The words of the will do not create an express trust in the defendant, and the plaintiff having attained age more than six years before the institution of this action his disability does not avail him: *Lockey* v. *Lockey* (24) decides this point, and is approved of in *Knox* v. *Gye* (25), and see *Hovenden* v. *Lord Annesley* (26)

(1) 1 Ch. Ca. 20.
(2) 1 Ch. Ca. 26.
(3) 4 Giff. 390.
(4) 36 I. L. T. R. 108.
(5) 44 I. L. T. R. 193.
(6) 4 Ch. Div. 144.
(7) 2 Jur. (N. S.) 729.
(8) L. R. 2 H. L. 1.
(9) 1 Sw. 137.
(10) 13 Q. B. D. 360.
(11) 18 Beav. 87.
(12) 37 Ch. Div. 96.
(13) L. R. 2 H. L. 149, 170.
(14) 29 Beav. 110.
(15) 4 Y. & C. (Ex.) 42.
(16) 69 L. J. Ch. 813.
(17) 1 H. Bl. 271.
(18) L. R. 9 Ap. Cas. 434.
(19) L. R. 6 H. L. 223, 234.
(20) L. R. 6 Ap. Cas. 181, 190, 191.
(21) L. R. 20 Eq. 698.
(22) 6 Cl. & Fin. 911.
(23) 3 Sw. 1.
(24) Chan. Prec. 518.
(25) L. R. 5 H. L. 656, 674.
(26) 2 Sch. & Lef. 607, 633.

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and *Hicks* v. *Sallitt* (1); *Denys* v. *Shuckburgh* (2); *Soper* v. *Arnold* (3).

The defendant cannot be held liable as mortgagee or equitable chargeant in possession of the lands. She entered into possession under an agreement to pay arrears and accruing interest of the mortgages and charge, and she received the rents and profits of the lands under a mistake of law as to the effect of the will of John Forster, and the plaintiff and his guardian, with full knowledge of the facts and being fully advised, acquiesced in her possession. There was in this case a stated and settled account and a concluded compromise between the parties; the defence of plene computavit is amply sustained. The following authorities were cited:—*Baxter* v. *Hozier* (4); *Stapilton* v. *Stapilton* (5); *Hughes* v. *Gordon* (6); *Rogers* v. *Ingham* (7); *Drew* v. *Power* (8); *Lucy's Case* (9); *Roche* v. *O'Brien* (10); *Dixon* v. *Evans* (11); *Cook* v. *Wright* (12).

Leet, in reply:—

The transactions between the parties in reference to the account did not amount to a compromise. A compromise to be enforceable must bind both sides. If the defendant had succeeded in her appeal to the House of Lords she would have refused to be bound by the account in question. How can the plaintiff be bound in every event by an account which the defendant could in certain events repudiate? It would have been different if the defendant had said, "I will drop the appeal if you will be content with a six years' account." The account was conditional, and cannot, therefore, be construed as a stated and settled account.

As regards plaintiff's claim for an account against the defendant as mortgagee in possession, it is clearly impossible on the authorities to distinguish between the liabilities of a chargeant in possession and those of a mortgagee. Though the chargeant

(1) 3 De G. M. & G. 782.
(2) 4 Y. & C. (Ex.) 42, 52.
(3) 37 Ch. Div. 96.
(4) 5 Bing. N. C. 288.
(5) 1 Atk. 2, 10.
(6) 1 Bligh 287.
(7) 3 Ch. Div. 351.
(8) 1 Sch. & Lef. 182.
(9) 4 De G. M. & G. 356.
(10) 1 Ba. & Be. 330, 354.
(11) L. R. 5 H. L. 606.
(12) 1 Bing N. C. 559.

may have no legal right to go into possession, still if he in fact enters and remains in possession as chargeant, and proffers to account as chargeant, he cannot pretend that because he has not got the legal estate he is not bound to account as fully as a mortgagee in like circumstances. It has never been questioned that a mortgagee, having the legal estate, must account for rents during the entire time he has been in possession. On what ground can a different rule be applied to what is technically an equitable estate from that which is applicable to what is technically a legal estate?

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I admit I can find no direct authority on the point (1).

BARTON J., having stated the facts above set out, proceeded:— Feb. 20.

This case is a sequel to the decision of the Court of Appeal in *Forster* v. *Forster* (not reported), dated June 3rd, 1914. That decision came as a surprise to all the parties concerned, who then discovered for the first time that they had since 1904 been proceeding under a mistake, common to them all, in reference to their respective rights under two mortgages on the lands of Normansgrove. The defendant had in 1895 gone into possession of these lands of Normansgrove and of other lands of Ballymichill under an agreement with her brothers, who were supposed to be entitled under their father's will, between them, to the fee simple of all the lands. It was agreed that she should go into possession for the purpose of paying herself arrears of interest, and accruing interest, under a paramount charge of £1000 affecting all the lands, which had been created by the will of her father, and under two mortgages affecting the lands of Normansgrove which were given to her by her brothers to secure £950. When the surviving brother died in 1904, there were large arrears of interest due on foot of the mortgage, and she was allowed to continue in possession, and to continue applying the rents and profits of the lands in the same way as before. Her continuance in possession is not complained of, because she was still entitled

(1) See *The Incorporated Society* v. *Richards* (4 Ir. Eq. Rep. 177, at p. 197); and *Antrim County Land Company* v. *Stewart* ([1904] 2 I. R. 357). (REP.)

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to receive, in discharge of the interest upon the paramount charge, all the rents of Ballymihill and part of the rents of Normansgrove. What is complained of is that after 1904 she applied the surplus rents of Normansgrove to paying herself the interest on the two mortgages which, as it now turns out, were only binding on the life interest of her brother in the lands of Normansgrove. After the mistake was discovered in 1914 she relinquished possession of the lands of Normansgrove, and she claims to have vouched an account, at the request and to the satisfaction of plaintiff's solicitor, on the basis of a liability to repay to plaintiff six years' back rents that had been misapplied. Plaintiff, having become dissatisfied with an account on that basis, now claims, in this action, an account on the basis that defendant should pay back the whole of the eleven years' back rents misapplied since 1904. The sole question between the parties is whether the plaintiff is entitled to an unlimited account for the whole period of eleven years, or to an account for six years only. If the defendant is only accountable for six years, the action must be dismissed, because she has always been willing to account, and she has accounted for six years. Besides the plea of the Statute of Limitations, the defendant also relies upon a defence of compromise and plene computavit. In my opinion she is entitled to succeed upon both branches of the case, and to have the action dismissed.

Mr. Leech, in his opening statement, said that he claimed an unlimited account from the date of the accrual of plaintiff's title in 1904. In the first place he made this claim against the defendant as a bailiff who entered on the estate of an infant in 1904, and cited *Dormer* v. *Fortescue* (1), where (at p. 130) Lord Hardwicke said, "So in the case of a bill brought by an infant to have possession of the estate, and an account of rents and profits, the Court will decree an account from the time of the infant's title accrued, for every person who enters on the estate of an infant enters as a guardian or bailiff for the infant." A claim on that basis cannot, in my opinion, be maintained, for the simple reason that the plaintiff came of age, and his disability ceased, eight years before the commencement of this action. Accordingly, he is within the rule, which I may quote for convenience sake, from

(1) 3 Atk. 123.

Halsbury, xix, p. 171:—"If he (the infant) does not sue till more than six years after the cessation of disability, the disability will not avail him at all so far as mesne profits are concerned." That has been the law ever since *Lockey* v. *Lockey* (1). It would be different if the defendant had been plaintiff's guardian, but the plaintiff's guardian was his mother, and defendant, although an aunt, was, in the legal sense of the word, a "stranger." In *Graham* v. *Chambers* (2), Palles C.B. said, at p. 109—"It is now well settled that the doctrine that one who, although a stranger, enters on an infant's land, is deemed to enter as his bailiff, does not make the bailiff an express trustee so as to prevent the operation of the Statute [of Limitations]." *Re Codd* and *Pettitt* (3) is distinguishable, because in that case the bailiff was executor as well as devisee, and a legacy charged on the devised lands was in question. It is true that defendant, although she did not take out probate, was named with her three brothers as an executrix in her father's will. But these lands were real estate, and were devised directly to the devisees for life and in remainder without the intervention of any trustee. She was in no sense an express trustee of these rents and profits.

These were the only grounds upon which an account was claimed in the writ and statement of claim; but, in his opening statement, Mr. Leech adumbrated an alternative basis of account, and on the third day of the trial asked for leave to amend the statement of claim by claiming an account against the defendant as a mortgagee and chargeant in possession.

Defendant's counsel objected to that amendment, pointing out that since the commencement of the correspondence, eighteen months back, no such account had been asked for, and that it was then too late for them to plead estoppel and other defences. I allowed the amendment on terms that defendant is to be at liberty to plead estoppel or any other defence which the facts justify; and that, if the plaintiff should succeed upon this alternative claim, he should submit to any terms which the Court might see fit to impose as to costs. I do not find it necessary to fix those terms, because I am of opinion that this alternative claim cannot be sustained, and does not fit the facts of the case.

(1) Prec. Ch. 518. (2) 36 I. L. T. R. 108. (3) 44 I. L. T. R. 193.

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A claim against the defendant as mortgagee in possession seems to be utterly untenable, for the simple and obvious reason that the relation of mortgagor and mortgagee never existed between plaintiff and defendant. That is a fundamental fact in this case, and is the ground and reason of plaintiff's right to an account. She was only the mortgagee of the late tenant for life, and she cannot be accountable to plaintiff in the character of mortgagee in possession. The plaintiff's claim against defendant as "chargeant in possession" is equally untenable. A mere equitable chargeant has not the same right as a legal mortgagee to go into possession; and, in the present case, the defendant went into possession under a special arrangement for a special purpose. But there is another reason why the plaintiff cannot treat the defendant as a "chargeant in possession" for the purpose of getting an unlimited account against her. There is no interest due on the charge. The interest on the charge has been paid in full, as appears from the accounts, and from two decrees of the Master of the Rolls dated in 1914 and 1915 respectively, which, even if they do not operate as an estoppel, afford the best possible evidence between the parties.

The proposed amendment is an afterthought put forward at the trial, in order to escape the effect of *Lockey* v. *Lockey* (1). In my opinion, this amendment does not help plaintiff, and his advisers were right in not putting it forward sooner.

If the plaintiff's right is to have the account taken on the basis of the defendant's possession, it would seem to me to be more consistent with the facts of this particular case to treat the defendant as a mortgagee of a tenant for life, who has been overholding after the death of the tenant for life. That is what she was quâ the surplus rents of Normansgrove after paying the interest on the paramount charge. The plaintiff as remainderman would be entitled to an account against the defendant as a mortgagee of the tenant for life overholding after his death. Such accounts have been ordered from time to time, and the principles applicable to such an account were settled by the Court of Appeal in *Hickman* v. *Upsall* (2), where it was held that the

(1) Chan. Prec. 518. (2) 4 Ch. Div. 144.

mortgagee of a tenant for life, who overholds after the death of the tenant for life, is not thereby placed in a fiduciary relation; that the remainderman was only entitled to a six years' account; and that, if the remainderman was guilty of laches, which James L.J. defined as neglect in bringing a suit when it could have been brought, the account would only run from the date of the institution of the suit.

That brings me to the defence of compromise and plene computavit. On the day of the decision of the Court of Appeal (3rd June, 1915), plaintiff's solicitors wrote demanding possession, and an account of rents and profits from 1904; i.e., for eleven years. Defendant's solicitors replied that the defendant contemplated an appeal to the House of Lords. Plaintiff's solicitors wrote in answer that plaintiff's rights under the order of the Court of Appeal were not stayed by the contemplated appeal to the House of Lords. That was correct; and the defendant at once yielded; and on the 21st June defendant's solicitors offered a six years' account as all that the plaintiff could legally claim. No objection was then taken; but, when the defendant on the 15th July furnished a six years' account, plaintiff's solicitors wrote on the 16th and 21st insisting on an eleven years' account.

[His lordship discussed the correspondence, and held that it disclosed an unqualified promise on the part of plaintiff's solicitor to accept, subject to vouching and the question of agent's fees, an account which had been tendered by the defendant, and that the account had been vouched by plaintiff's solicitor, showing an admitted balance due by defendant. His Lordship then proceeded]:—From that time the plaintiff had a right to receive the agreed balance as a debt (subject to the item of agent's fees remaining open), and the defendant had a correlative right to defend any further action for an account, having in accordance with the rule as laid down in *Baxter* v. *Hozier* (1) vouched to the satisfaction of plaintiff's solicitor an account showing an agreed balance due by herself. The subsequent correspondence is not very material. There was some haggling about the agent's fees, and there was some harking back by plaintiff's solicitor to a claim for an eleven

(1) 5 Bing N. C. 288, 299.

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years' account. But defendant neither could nor did break off. [His Lordship then dealt with the remainder of the correspondence, and proceeded]:—

Plaintiff's answer to the defence of compromise and plene computavit is contained in paragraph 4 of his reply, in which he says that he was willing to accept a sum based on a six years' account by way of compromise, and to avoid litigation, but that defendant ultimately refused to pay the said sum or any sum or to be bound by the said account, and repudiated and still repudiates the claim to recover anything. In my opinion defendant neither could nor did refuse to be bound by the account.

Plaintiff's counsel also contended that there was no consideration, because defendant gave up nothing. I cannot agree with that contention. The real consideration in a case of this kind is the necessary alteration of situation to which the party accounting submits: *Cook* v. *Wright* (1). In the present case the defendant at the plaintiff's request and in consideration of his promise to accept the account, if vouched, submitted to a serious change of situation by which this debatable and unliquidated claim was converted into a liquidated debt ascertained and immediately recoverable.

In my opinion the plaintiff has no right to an account in respect of more than six years' back rents; and, even if he had a larger right, he has lost it by the vouching and acceptance of an account in the manner and in the circumstances disclosed in the correspondence. That being so, the action will be dismissed with costs.

Solicitors for plaintiff: *Wm. Fry & Son.*
Solicitor for defendant: *H. B. Burton.*

R. W. L.

(1) 1 B. & S. 559, at p. 570.

HENDERSON, APPLICANT; CALLAN, RESPONDENT (1).

Ross J.
1917.
Dec. 10.

Practice—Courts (Emergency Powers)—Judgment mortgage for sum over £100—Leave to institute proceedings.

Rule 3, sub-r. 2, of the Irish rules of September, 1914, made under the Courts (Emergency Powers) Act, 1914 (4 & 5 Geo. 5, c. 78), applies to cases within s. 1, sub-s. 1 (*b*), of the Courts (Emergency Powers) (No. 2) Act, 1916 (6 & 7 Geo. 5, c. 18); and consequently the preliminary application for leave to institute proceedings in the County Court to raise the amount of a judgment mortgage for a sum exceeding £100, registered in 1917 on foot of a judgment for a debt incurred prior to August 4, 1914, was properly made to the High Court.

ORIGINATING SUMMONS under the Courts (Emergency Powers) Acts, 1914 and 1916, for leave to realize a judgment mortgage. The judgment mortgage was registered on May 16th, 1917, in respect of a judgment obtained for a debt incurred prior to August 4th, 1914. The principal sum secured was £142.

C. Murphy, for the applicant:—

No proceedings have yet been instituted, and I submit that a preliminary order from the High Court is necessary. Sect. 1, sub-s. 1 (*a*), of the Act of 1914 deals with money judgments. The matters dealt with by sub-s. 1 (*b*) may be divided into three classes—1, what a creditor can do for himself; 2, what he can only do with the assistance of the Court; 3, what he can do in one way or the other. The rule referring to paragraph (*b*) is rule 3 of the Irish Rules of September 17, 1914. A distinction is there drawn between proceedings where one has to go to the Court, and where such a course is unnecessary. [He read rule 5 (1) (*a*).]

[Ross J.—That rule includes the taking of proceedings to enforce a judgment mortgage. If the debtor is in Court, the application can be made forthwith; if he is not, a summons must be issued.]

(1) Before Ross J.

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This case comes under rule 3 (2). The principal secured is £142; it is therefore not within the County Court jurisdiction—rule 3 (2) (*b*); consequently the procedure is regulated by rule 5 (2), and this application must be by originating summons. The Courts (Emergency Powers) (No. 2) Act, 1916, was passed in consequence of the decisions in *In re Farnol, Eades, Irvine, & Co., Ltd.* (1), and *Ziman* v. *Komata Reefs Gold Mining Co., Ltd.* (2). *Ness* v. *O'Neill* (3) was decided before the passing of the Act of 1916. The present application comes within "the institution of proceedings . . . for sale in lieu of foreclosure," provided for in sect. 1, sub-s. 1 (*b*), of the Act of 1916, which paragraph must be read into paragraph (*b*) of the original Act; and the rules made under the first Act apply to the added matter. The Court to which application is to be made may in any case be the High Court. *In re Anderson & Son* (4) indirectly bears out my contention, and *Hosack* v. *Robins* (5) is also an authority in applicant's favour. [He also cited *O'Flaherty* v. *Gethings* (6) and *The National Bank, Ltd.*, v. *Claffey* (7).] The effect of the Acts is summed up in *Reversionary Interest Society, Ltd.*, v. *Unwin* (8), where Eve J. said he "must conclude that for good reasons the Legislature had come to the conclusion that neither should the action be commenced, nor should it proceed to its final and destined end, without in each case obtaining the leave of the Court." I propose to take proceedings in the County Court, but I must obtain leave from the High Court to do so.

J. C. Davison, for the respondent:—

None of the cases cited applies here. I admit that an application must be made, but where? Under which rule? Is it under rule 3 (1), or rule 3 (2), or under neither of them? Mr. Murphy says rule 3 (2) covers this case. He wishes to obtain sale in lieu of foreclosure, and must come to the Court for it; but sub-r. (2) only applies to cases where a creditor need not come to Court to enforce his claim. Consequently, the reference to the High Court

(1) [1915] 1 Ch. 22.
(2) [1915] 2 K. B. 163.
(3) [1916] 1 K. B. 706.
(4) [1916] W. N. 321.
(5) [1917] 1 Ch. 332.
(6) [1916] 1 I. R. 265.
(7) [1917] 2 I. R. 281.
(8) [1917] W. N. 366.

in sub-r. (2) has no application here. The effect of rule 3 (1) is not quite clear. Possibly no provision has been made for a case of this kind. If the mortgagee's contention is correct, the principal sum being over £100, the application for leave to institute proceedings must be made to the High Court, even though the applicant intends to enforce his claim in the County Court. This is a new point, which has not yet been decided.

Murphy, in reply :—

I must get my preliminary order somewhere. I would be met with the same difficulty in the County Court, my claim being for more than £100.

Ross J.:—

I see no ground for doubt in this case. We have here a judgment mortgage, and under paragraph (*b*) of sect. 1, sub-s. 1, of the Act of 1914, as extended by the Act of 1916, the applicant cannot institute proceedings for sale without the leave of the Court. To what Court is the application to be made? Rule 3, sub-r. (2), in my opinion, exactly applies to this case. This rule refers to paragraph (*b*) of the earlier Act, as extended by the later Act, and provides that the application may in any case be made to the High Court. The applicant is within his rights in applying here, and I make the order sought.

Solicitor for the applicant : *T. W. Kilpatrick.*
Solicitors for the respondent : *Bailie & Co.*

T. C. T.

M. R.
1917.
June 5, 20.

Appeal.
1918.
Jan. 16.

DUCKETT, Deceased.
PHILLPOTTS *v.* FITZMAURICE.
(1917. No. 421.)

Heirlooms—Trust of chattels as—Construction—To be enjoyed with mansion house—Tenant in tail—Vesting—Intention—Actual possession.

A mansion house and demesne were settled by will in 1858 to the use of the testator's son S. D. for life, and after his death to the use of such son of S. D. as he should appoint, and in default of appointment to the use of the first and every other son of S. D. successively in tail male. The testator bequeathed to trustees all the plate, pictures, books, and prints at the time of his death in the mansion house upon trust to permit the same to be enjoyed with the mansion house so far as the rules of law and equity would admit by the person who for the time being should be entitled to the possession of the mansion house by virtue of the will. The testator bequeathed the residue of his personal estate to S. D.

S. D. went into possession of the mansion house and demesne on the death of the testator. S. D. had two children, a son J. S. D., and a daughter A. who married P. S. D. and J. S. D. disentailed the estate, and afterwards appointed that the mansion house and demesne should go to and remain to the use of S. D. for life, and after his death to his daughter A. during her life, with remainders over to her issue. S. D. died in 1915, having appointed A. his executrix and residuary legatee. She went into possession of the mansion house, demesne, and chattels. J. S. D. claimed the chattels as tenant in tail under the will of S. D.

Held, by the Court of Appeal, affirming the decision of O'Connor M.R., that the intention of the testator was that the chattels should go to the person who should have actual possession of the mansion house, and not to the person who, in events which had not happened, would have become entitled to actual possession, and that A. was entitled to the chattels.

Re Chesham's Settlement, [1909] 2 Ch. 329, followed.

Adjourned Summons.

This was a summons taken out by Mrs. Amy Phillpotts, executrix and residuary legatee of the will of Steuart Duckett, to determine whether she or the defendant, John Steuart Duckett, was entitled under the will of William Duckett to the chattels thereby directed to be held and enjoyed with the mansion house of Russelstown Park.

William and Arthur Fitzmaurice were made defendants as executors of the sole acting trustee and executor of the will of William Duckett.

The following statement of the facts is taken from the judgment of O'CONNOR M.R.:—

By the will of William Duckett, dated 5th August, 1858, the mansion house and demesne lands of Russelstown Park, in the county of Carlow, stood limited to the use of Steuart Duckett and his assigns for his life, and after his death to the use of such son of the said Steuart Duckett as he should by deed or will appoint and the heirs of the body of such son, and in default of appointment then to the use of the first and every other son of the said Steuart Duckett severally and successively in tail male.

By his will the testator also bequeathed to trustees all the plate, pictures, books, and prints at the time of his death in or about the mansion house upon trust to permit the same from time to time to go and be held and enjoyed with the mansion house so far as the rules of law and equity would admit by the person or persons who for the time being should be entitled to the possession of the said mansion house by virtue of the said will.

The testator further bequeathed all the residue of his personal estate to the said Steuart Duckett. The testator died on the 10th May, 1868, and his will was duly proved. Steuart Duckett went into possession of the mansion house and lands under the will. He had only two children, a daughter, now Amy Phillpotts, and John Steuart Duckett.

By an indenture dated 4th March, 1898, made between Steuart Duckett of the first part, John Steuart Duckett of the second part, and Arthur Fitzmaurice and Charles Robert Butler of the third part, the said Steuart Duckett released the hereditaments demised by the will from the power of appointment thereby given to him as aforesaid; and by the same indenture the estate in tail male of the said John Steuart Duckett and all remainders were barred, and the said hereditaments were granted to such uses as the said Steuart Duckett and John Steuart Duckett should by any deed or deeds jointly appoint.

By a further indenture dated the 27th July, 1899, and made between Steuart Duckett of the first part, John Steuart Duckett of the second part, Amy Duckett of the third part, and Arthur Fitzmaurice and Charles Robert Butler of the fourth part, the said Steuart Duckett and John Steuart Duckett in exercise of the

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power vested in them by the disentailing assurance appointed the hereditaments to such uses as they should from time to time by deed or deeds jointly appoint, and in default of and subject to any such appointment in strict settlement upon Steuart Duckett, John Steuart Duckett and his issue, and Amy Duckett and her issue, as therein mentioned.

By deed poll, dated the 13th August, 1913, Steuart Duckett and John Steuart Duckett, in exercise of the power reserved to them by the last-mentioned indenture, irrevocably appointed that the mansion house and demesne should thenceforth go and remain to the use of Steuart Duckett for his life, and after his death to Amy Duckett during her life, with remainders over to her issue. John Steuart Duckett was thereby cut out of the settlement.

None of these deeds made any reference whatever to the chattels which were bequeathed by the will, and which were to go with the mansion house. Steuart Duckett was in possession of the mansion house and demesne till his death, which occurred on the 17th April, 1915. He made his will on the 3rd June, 1903, and bequeathed the residue of his property to his daughter Amy, who had become Mrs. Phillpotts. His will was duly proved. Since his death Mrs. Phillpotts has been in possession of the mansion house and demesne, and all the chattels which were in the house. John Steuart Duckett now claimed the chattels under the will of William Duckett, while Mrs. Phillpotts claimed them as the residuary legatee and personal representative of Steuart Duckett, who was the residuary legatee of William Duckett.

Brown K.C. and *H. R. Poole*, for the plaintiff:—

John Steuart Duckett is not entitled to the chattels under the will of Steuart Duckett, as he has not been and never can be tenant-in-tail in possession of the mansion house. Under the deed of appointment of the 13th August, 1913, he parted with his interest, and the right to possession passed away. The right to the chattels under the will was so attached to the right to the mansion house that when the right to the mansion house went, the right to the chattels went too. The gift of the chattels, therefore, failed, and they passed under the residuary clause in the will to Steuart Duckett, and under his will to the plaintiff.

The case is governed by authority, being indistinguishable from *Re Chesham's Settlement* (1). The legal principle to be applied in cases like it is very clearly stated by Cozens-Hardy M.R. at p. 333. It was there held that it was not intended by the instrument that any person should take the chattels unless he became tenant-in-tail in actual possession of the settled estate. The present case is even stronger than that case, as the person who might have become entitled to the chattels as tenant-in-tail parted with his interest while yet in remainder.

Lord Scarsdale v. *Curzon* (2) shows that the question is one of intention, to be gathered from the words of the particular instrument. *Harrington* v. *Harrington* (3) was also referred to.

FitzGibbon K.C. and *Macrory*, for the defendant John Steuart Duckett:—

The trust of the chattels in this case is the same as the trust of the chattels in *Re Chesham's Settlement* (1), but the facts differ. In that case the first tenant-in-tail of the mansion house had died in the lifetime of the tenant for life, but in the present case John Steuart Duckett, who is the first tenant-in-tail of the mansion house under the will of William Duckett, has survived the tenant for life, and is able to say, "I am entitled by virtue of the will of the testator to the enjoyment of the mansion house." Although his dealings with his remainder during the life of the tenant for life prevent his having the actual enjoyment, they do not take away his right by virtue of the will to such enjoyment: *Legh* v. *Petre* (4).

Re Chesham's Settlement (1) is opposed to a long line of previous authorities, which are collected in 1st Jarman on Wills, 6th ed., p. 697, note, where the case is very adversely criticised, and it should not be followed except in a like state of facts. It was distinguished, on very slight grounds, in *Re Parker* (5) and *Re Beresford-Hope* (6).

Leech K.C. for the other defendants.

(1) [1909] 2 Ch. 329.
(2) 1 J. & H. 40.
(3) L. R. 5 H. L. 87.
(4) [1910] 1 Ch. 291.
(5) [1910] 1 Ch. 581.
(6) [1917] 1 Ch. 287.

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O'CONNOR M.R. stated the facts as above, and proceeded as follows:-

The net question is, did John Steuart Duckett, by parting with his estate in remainder before it fell into possession, forfeit all title to the chattels bequeathed by the will of William Duckett? Now, this depends entirely on the meaning of the will of William Duckett. It is a question of construction, and is to be determined by reference to the will itself. The bequest of the chattels in question is to trustees upon trust to permit them from time to time to go and be held and enjoyed with the mansion house so far as the rules of law and equity will admit by the person or persons who for the time being shall be entitled to the possession of the said mansion house by virtue of the testator's will. The only meaning which I can put upon this is that the chattels shall go to the person or persons who shall have actual possession, and not to the person or persons who, in events which have not happened, would have become entitled to actual possession. I think that the very object of a settlement of movable chattels as heirlooms bears out such a construction, because apart from actual possession of a family mansion heirlooms lose half their value. So I would decide, apart from all authority; but the case seems to me to be concluded by *Re Chesham's Settlement* (1), in which the trusts declared in respect of chattels were in terms almost identical with the trusts declared in William Duckett's will. In that case it was held by the Court of Appeal that the chattels vested only in a tenant-in-tail in actual possession. The rule of law which gives an absolute estate to the tenant-in-tail of chattel property at the moment he comes into existence is stated, but there is also stated the rule that, subject to not infringing the rule against perpetuities, a settlor may by sufficient words indicate that chattels are not to vest in any person except one who de facto becomes entitled in possession as tenant-in-tail. In *Re Chesham's Settlement* (1) the contest was between the personal representative of a deceased tenant-in-tail who died in the lifetime of the tenant for life, and the next tenant-in-tail who had become entitled in possession. In the present case the contest is between the residuary legatee's personal

(1) [1909] 2 Ch. 329.

representative and the person who was tenant-in-tail under the will, and would now be entitled to possession were it not that he had parted with his estate when in remainder. It was urged that this distinguishes it from *Re Chesham's Settlement* (1), but this seems immaterial, as the only question is one of construction, and, if the meaning of the will is that actual possession is essential to the title to the chattels, that meaning cannot be changed by the respective characters of the rival claimants. For these reasons I am of opinion that Mrs. Amy Phillpotts is entitled to the chattels in question.

The costs of all parties must be paid out of the estate of the testator William Duckett.

W. L.

The defendant, John Steuart Duckett, appealed to the Court of Appeal. The Court (2), without calling upon counsel for the respondents, affirmed the judgment of the Master of the Rolls.

Solicitors for the plaintiff: *H. & W. Stanley.*

Solicitors for the defendant J. S. Duckett: *Whitney, Moore, & Keller.*

Solicitor for the defendants W. & A. Fitzmaurice: *Jameson.*

R. ST. J. C.

(1) [1909] 2 Ch. 329.

(2) Before SIR IGNATIUS J. O'BRIEN C., and RONAN and MOLONY L.JJ.

Appeal.
1918.
Jan. 23, 24.

CONGESTED DISTRICTS BOARD FOR IRELAND, LANDLORDS; BRIDGET O'DONNELL, TENANT (1).

Land Law (Ireland) Acts—Congested Districts Board—Power of Resumption—Migration and enlargement of holdings—Land Law (Ireland) Act, 1881, *sect. 5, sub-s. 6*; *Irish Land Act*, 1903, *sect.* 83.

Section 83 of the Irish Land Act, 1903, does not empower the Court to authorize the resumption by the Congested Districts Board of part of a holding for the purposes of migration or the enlargement of holdings.

APPEAL by the tenant from an order of the Irish Land Commission authorizing the resumption under sect. 83 of the Irish Land Act, 1903, of part of her holding by the Congested Districts Board.

The holding of the tenant consisted of 176 acres, 3 roods, and 31 perches, and it was in two separate divisions, six miles apart. The rent was £100, and the valuation £92. One division of the holding contained 26 acres, 0 roods, and 20 perches, and the Congested Districts Board, as landlords, applied to the Land Commission Court for an order authorizing the resumption by them of this portion of the holding for the purpose of migration or the enlargement of holdings. The sub-commission granted the application, and fixed £700 to be paid to the tenant as full compensation for the part resumed, and directed that the fair rent payable for the remainder of the holding should be abated to £84. The tenant appealed to the Land Commission upon the ground that the Board had no power to resume compulsorily a part of the holding. Mr. Justice FitzGerald was of opinion that, reading the words in sub-s. 6 of sect. 5 of the Land Law (Ireland) Act, 1881, together with the words in sect. 83 of the Irish Land Act, 1903, "holding" in the latter section included part of a holding, and therefore that the Congested Districts Board could maintain

(1) Before SIR IGNATIUS J. O'BRIEN C., SIR JAMES H. CAMPBELL C.J., O'CONNOR M.R., and RONAN and MOLONY L.JJ

an application to resume part of a holding for the purpose of migration or the enlargement of holdings. The present appeal was from that decision.

Jellett K.C. and *H. Wilson K.C.* (with them *Price*), for the appellant:—

Under sect. 5, sub-s. 6, of the Land Law (Ireland) Act, 1881, the Court may, upon being satisfied that the landlord is desirous of resuming "the holding or part thereof" for some reasonable and sufficient purpose having relation to the good of the holding or of the estate, including the use of the ground as building ground, or for the benefit of the labourers in respect of cottages, gardens, or allotments, or for the purpose of making grants, or leases, and sites for churches or other places of religious worship, schools, dispensaries, or clergymen's, or schoolmasters' residences, authorize the resumption thereof by the landlord. All the purposes enumerated necessitate the resumption of part only of a holding; and during the continuance of a first statutory term the Court is by sect. 8, sub-s. 3, precluded from entertaining an application for resumption. Under sect. 21 of the Act the Court may authorize the resumption of "the holding" where it is satisfied that the landlord requires it for the purpose of a residence or as a home-farm in connexion with his residence. This section refers to one entire holding, while the purposes mentioned in sect. 5, sub-s. 6, contemplate resumption of part of a holding.

Section 38, sub-s. 4, of the Purchase of Land (Ireland) Act, 1891, enacts that the provisions of that Act respecting amalgamation of holdings shall, in cases where the Congested Districts Board think it expedient, apply to "a part of a holding." It was considered necessary in that section to give the Board specific power to deal with part of a holding.

The Congested Districts Board (Ireland) Act, 1893, conferred upon the Congested Districts Board powers identical with those of ordinary landlords. In addition to the purposes for which a holding or part of a holding may be resumed under sect. 5, sub-s. 6, of the Act of 1881, the Congested Districts Board may be authorized, under sect. 83 of the Irish Land Act, 1903, to resume "a holding" for the purposes of migration or the enlargement of

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holdings. For the purposes of this section the Board are clearly limited to the entire of a holding. Power to resume a part cannot be read into the section; wherever for other purposes they may resume a part, the power to do so is expressly given.

The decision in the *Congested Districts Board* v. *Armstrong* (1) has no application to this case. The purposes of sect. 83 can be carried out regardless of the limitation imposed by sect. 8, sub-s. 3, of the Land Law (Ireland) Act, 1881. Section 83 of the Act of 1903 refers to sect. 5, sub-s. 6, of the Act of 1881, merely for the purpose of introducing the machinery of the latter section, and also to show that the power of resumption given by sect. 83 is in addition to that which the Board had already possessed as landlords. Sect. 83 gives power to the Congested Districts Board to acquire private property compulsorily, and the general rule is that such legislation must be interpreted strictly. In the construction of statutes, one must not construe the words so as to take away rights which already existed before the statute was passed, unless there are plain words which indicate that such was the intention of the Legislature: per Bowen L.J. in *In re Cuno* (2). It is a strong thing to read into an Act of Parliament words which are not there, and, in the absence of clear necessity, it is a wrong thing to do: per Lord Mersey in *Thompson* v. *Gould & Co.* (3).

[Ronan L.J. refers to the Notice to Quit (Ireland) Act, 1876 (39 & 40 Vict. c. 63), sect. 3.]

As to the general powers for acquiring lands compulsorily, we would refer to sect. 92 of the Lands Clauses Act, 1845, which enacts that no party shall be required to sell or convey to the promoters a part only of any house or other building or manufactory if such party be willing and able to sell and convey the whole thereof.

Fetherstonhaugh K.C. and *Wylie K.C.* (with them *J. FitzGerald Kenny*), for the respondents:—

The Congested Districts Board, as landlords, can unquestionably acquire part of a holding under sect. 5, sub-s. 6, for the

(1) [1912] 1 I. R. 174. (2) 43 Ch. Div. 12, at p. 17.
(3) 79 L. J. K. B. 905, at p. 911.

purposes therein mentioned; and the only effect of sect. 83 of the Act of 1903 is to increase the purposes for which resumption may be authorized. Migration and the enlargement of holdings may possibly have some relation to the good of the holding or of the estate. *Armstrong's Case* (1) was rightly decided; but it is no authority for the proposition that "holding" in sect. 83 does not include part of a holding. Sect. 83 must be construed together with sect. 5, sub-s. 6, of the Act of 1881. If after "schoolmasters' residences" in sub-s. 6 of sect. 5 the words "or for the purposes of migration or the enlargement of holdings" be added, the Court may, upon an application by the Board, as it could in the case of an application by a landlord, authorize the resumption of the holding, or part thereof; but as the words "during the continuance of a statutory term" are used in sect. 83 without any restriction, sect. 8 of the Act of 1881, which excludes holdings held under a first statutory term, does not apply. The Board may, as landlords, resume a holding or part thereof for the good of the holding or of the estate; but this power of resumption cannot be exercised during the existence of a first statutory term. Sect. 83 enables them as a public body to resume a holding or part thereof without any restriction as to a first statutory term, for the purpose of migration or the enlargement of holdings inside a Congested Districts County.

Jellett, in reply:—

The subject-matter in sect. 83 is a holding, and nothing else.

SIR IGNATIUS J. O'BRIEN C.:—

We put this case in the list for consideration by the full Court, first, because of its great importance to the Congested Districts Board and, of course, to the particular tenant; and next, because when it was first opened before us by Mr. Jellett, he laid such great stress upon some portions of the judgments in *Congested Districts Board* v. *Armstrong* (1) that two members of the Court thought that *Armstrong's Case* (1) possibly might not have been rightly decided, and would, probably, require re-consideration. During the exhaustive and learned addresses which have been

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delivered to us the present case has, however, assumed a somewhat different aspect; and it now appears that the arguments of the appellants can be placed before the Court effectively without invoking the aid of the decision or judgment in *Armstrong's Case* (1), while the Congested Districts Board are also in a position to discuss their rights without reference to that authority. Accordingly, it is not my intention to say anything with regard to *Armstrong's Case* (1) save that I retain the view I held when this case was directed to be put in the list for the full Court, viz., that it is a case which must be left open for re-consideration if the question should directly arise.

Although it is necessary to pursue an investigation of some of the difficult sections forming our land code, the question which we have to determine is in the end an extremely simple one, the solution of which presents to my mind no difficulty. Sub-s. 6 of sect. 5 of the Act of 1881 regulates the relations of ordinary landlords and ordinary tenants; and it enacts with certain provisos that "during the continuance of a statutory term in a tenancy, save as hereinafter provided, the Court may, on the application of the landlord, and upon being satisfied that he is desirous of resuming the holding or part thereof for some reasonable and sufficient purpose, having relation to the good of the holding or of the estate (certain purposes are enumerated), authorize the resumption thereof by the landlord upon such conditions as the Court may think fit and require the tenant to sell his tenancy in the whole or such part to the landlord upon such terms as may be approved by the Court, including full compensation to the tenant." The first thing to be noted in connexion with that section is the subject-matter. On examination we find that there are what I shall call two subject-matters, namely, "the holding," which is a thing defined by sect. 57, and "a part thereof." Undoubtedly, the purposes for which resumption may be authorized are of a somewhat limited character; some are of a quasi-public nature, e.g., churches, schools, dispensaries, clergymen's and schoolmasters' residences; and the good to be effected by resumption for such purposes might not be confined to the estate; but, no

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matter what we may think of the purposes, there are plainly two subject-matters in the sense in which I employ the expression.

Between 1881 and 1903 several statutes were passed, not only modifying the relations of landlord and tenant, but also bringing into existence the Congested Districts Board, a body with very far-reaching jurisdiction, and in respect of holdings acquired by them under the provisions of the Land Purchase Acts the Board were put in the position of landlords. It has been argued that the Congested Districts Board prior certainly to 1903 and possibly prior to 1909 did not, where they had bought estates, occupy the position of landlords within the meaning of the definition section. To that argument I cannot assent It appears to me when the Board got statutory powers to hold estates including holdings occupied by tenants within the meaning of the definition of tenant in this code, and also the Act of 1860, that once they buy an estate with tenants on it, and the landlord's estate vests in them, they acquire the status of "landlord," unless something can be found in the Acts creating a different relation between them and the tenants. I find no provision of this latter kind which could negative the view that they are landlords; and I approach the case on the basis argued by Mr. Fetherstonhaugh, that the Board might be landlords within sect. 5, sub-s. 6, of the Act of 1881 for the purposes enumerated in that section.

When we come to the Act of 1903, which marked a great development in the policy of land purchase, we find that, amongst other things, the Board were given power to resume holdings for the purpose of migration or the enlargement of holdings.

Sect. 83 of the Act provides: "The resumption of a holding during the continuance of a statutory term by the Congested Districts Board may be authorized under sub-s. 6 of sect. 5 of the Act of 1881 for the purposes of migration or the enlargement of holdings, in addition to the purposes specified in that sub-section." Sect. 83 enables the Board to resume possession of "a holding" for a purpose of a public character and totally distinct from any of the purposes specified in sub-s. 6 of sect. 5 of the Act of 1881. It was necessary that there should be established some statutory tribunal which would have jurisdiction to consider the reasonableness of the application, and the terms on which the application

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might fairly be granted; and, as occurs in many other sections in this complex code, in order to prevent unnecessary reiteration the provisions as to procedure which were specified by sect. 5, sub-s. 6, of the Act of 1881 were adopted.

It has been contended, although the powers which the Congested Districts Board have in respect of migration and the enlargement of holdings are quite foreign to the purposes for which an ordinary landlord may resume possession of a holding or part thereof under the sub-section, that by some process of juggling we should intermingle the terms of sect. 83 with those of sect. 5, sub-s. 6, of the Act of 1881, so as to produce the result that a holding required for migration or enlargement of holdings under sect. 83 might be acquired by the Board either in whole or in part just as the landlord for the more limited purposes of sect. 5, sub-s. 6, of the Act of 1881 might resume possession of whole or part of a holding. This is not in my opinion the way in which sect. 83 should be read. It should be read as if it was inserted in the Act of 1881 at the end of sub-s. 6 of sect. 5, or as a separate sub-section. We then have "*a holding*" or "*a part of a holding*," which may be resumed for certain limited purposes, and in a subsequent sub-section we have one subject-matter, namely, "*a holding*," which may be resumed by the Congested Districts Board, not, as in the first case, for the good of the holding or of the estate, but for the purposes of migration or the enlargement of holdings. Then sect. 5 of the Act of 1881 is capable of being read in this way:—In addition to the powers of resumption given for the good of the holding or of the estate the Congested Districts Board is to be allowed to resume "*a holding*," for the purpose of migration or the enlargement of holdings. Resumption in the latter case plainly means resumption of the whole holding occupied under the contract of tenancy. I do not lay much stress upon analogies from the Lands Clauses Acts; but I do think that the analogy with the Notice to Quit (Ireland) Act, 1876, suggested by Lord Justice Ronan is very striking, and shows that when power is given with respect to a well-settled and defined subject-matter the Court should be very slow to exercise that power in regard to another subject-matter.

For these reasons I think the judgment of Mr. Justice FitzGerald was wrong, and should be reversed.

SIR JAMES H. CAMPBELL C.J.:—

I concur in the reasoning and the conclusion of the Lord Chancellor's judgment; and I only add that if I thought it necessary to consider the soundness of the decision in *Armstrong's Case* (1), I should have wished to look more carefully into the matter before coming to a determination. However, the view of the members of the Court is that it is not necessary to consider that decision; and, for my part, I must be taken as pronouncing no opinion upon it.

O'CONNOR M.R.:—

In this case the Congested Districts Board claim to have power to resume possession of part of a holding for the purposes of migration and enlargement of holdings. It is admitted that down to the year 1903 it had no power to resume possession of either whole or part of a holding for any such purpose. The Congested Districts Board must therefore point to some additional power conferred by the Act of 1903; and the power relied on is that contained in sect. 83 of that Act. Now that section enacts that the resumption of a holding may be authorized under sub-s. 6 of sect. 5 of the Act of 1881, for the purposes of migration and enlargement. That is the only power which is given, and it is to be noted that there is no mention of part of a holding, although throughout the Land Purchase Code, as has been pointed out, express power to take part as well as the whole is in all cases given where that was the intention of Parliament. Reading sect. 83 of the Act of 1903 by itself there is certainly no power to take part of a holding, but it is said that by reading it along with sect. 5, sub-s. 6, of the Act of 1881 we get the power to take part as well as the whole. If that were so, this curious result would follow that the section of the Act of 1881 whose scope did not embrace the purposes of migration and enlargement now gives power to take a part of a holding for such purposes. The power is in truth to be found in sect. 83 of the Act of 1903, and in that only. The power is one to authorize resumption, and the reference to sect. 5, sub-s. 6, of the Act of 1881 is merely made for the purpose of showing in what way that authority is to be exercised,

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viz.—"on such terms as may be approved by the Court, including full compensation to the tenant."

I think that this case is not the same as the *Congested Districts Board* v. *Armstrong* (1), and I do not consider it necessary to say anything more about that case, or to make any criticism on any of the judgments of the members of the Court.

Ronan L.J.:—

In my opinion sub-s. 6 of sect. 5 of the Land Law (Ireland) Act, 1881, is essentially a provision giving jurisdiction to an inferior Court. During the continuance of a statutory term "the Court may, on the application of the landlord," do so and so. Sect. 83 of the Irish Land Act, 1903, is an extension of that statutory jurisdiction, in the case of the Congested Districts Board.

When this case first came before the Court, it appeared to us that the case of *The Congested Districts Board* v. *Armstrong* (1) might have an important bearing on the present case. As we had grave doubts as to whether that case had been rightly decided, and as it could not have been taken to the House of Lords, it was arranged that this case should be heard before the full Court of Appeal. We have all arrived at the conclusion that it is not necessary for the decision of this case to express any opinion on the decision in *Armstrong's Case* (1).

At common law a landlord could recover possession of a holding by a notice to quit, but he had no power to take part of the holding, and leave the tenant in possession and subject to rent for the remaining part. The Notice to Quit Act, 1876, sect. 3, for the first time gave the landlord power to serve a notice to quit for part of a holding for certain purposes analogous to those mentioned in sect. 5 of the Act of 1881. This section of the Act of 1876, however, provides the most elaborate provisions for the protection of the tenant in the event of this right being exercised.

The Act of 1876 (sect. 8) is to be construed "as one Act" with the Act of 1870, and the Act of 1881 (sect. 57) is to be construed

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as one Act with the Act of 1870, so that the three Acts must be construed together as one Act. Sect. 83 of the Act of 1903 must, of course, be read with sect. 5 of the Act of 1881. We have, therefore, the Acts of 1870, 1876, and 1881 to be construed as "one Act," and sect. 83, an extension of a section in one of these three Acts. We therefore have, on the face of the code itself, a fundamental distinction between the resumption of part and the resumption of the entire of a holding. This resumption authorized by sect. 83 is an interference, in the nature of compulsory purchase, with the existing legal right of the tenant to retain the entire of his holding. It only purports to authorize the resumption of the entire holding.

I agree with the other members of the Court that it would be contrary to legal principles to extend this interference with the legal right of the tenant so as to enable the landlord (the Congested Districts Board) to take part of the holding without the tenant's consent. I can find nothing in the code to justify such an extension; on the contrary, it seems to me that the sections referred to by Mr. Jellett, and the provisions of the Act of 1876, are entirely opposed to such an extension.

MOLONY L.J. concurred.

Solicitor for the appellant: *H. C. Bourke.*
Solicitor for the respondents: *J. O'Connor.*

C. I.

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O'HIGGINS *v.* WALSH.
(1916. No. 353.)

Will — Solicitor Executor — Trustee — Profit costs — Legacy — Estate insufficient to pay all legacies — Priority — Condition that legatee should execute a settlement — Condition subsequent — Non-performance — Forfeiture — Gift over.

Where an estate is solvent but insufficient to pay legacies in full, the profit costs of a solicitor given to him by the will of the testatrix, of which he is appointed executor and trustee, do not take priority over other legacies.

A testatrix appointed trustees of her will, and directed them to set apart a sum of £1,000, to hold the same on trust from the expiration of one year after her death, subject to the proviso thereinafter appearing respecting such sum and the limitations thereof, to pay the income to her daughter M. for her life, and after her death for her children or remoter issue as M. should by deed or will appoint with certain remainders over in default of appointment and in default of issue, and directed that M. should within one year from her (testatrix's) death execute a settlement of certain interests to which she should become entitled under the will upon certain specified trusts, and directed that in the event of M. neglecting or declining to carry out that direction the trusts concerning her life estate in the sum of £1000 and all ulterior trusts thereof should be deemed of no effect; and there was then a gift over in favour of another daughter and her issue. Testatrix also directed that her solicitor (trustee and executor of her will) should act in carrying out the trusts of the will, and in the preparation and execution of any deeds to be executed for the carrying out of the desire and intention of the testatrix. The will was read over and explained by the solicitor trustee to the legatee, but the Court came to the conclusion that she did not clearly understand its provisions. She expressed herself willing to sign any document that the solicitor trustee should supply to her. She never executed any settlement in pursuance of the direction in the will. More than one year had elapsed since the death of the testatrix.

Held, that the solicitor trustee was not under any obligation to prepare or submit any particular document to the legatee for execution, and that as she had not complied with the condition she forfeited the legacy, and the gift over took effect.

ORIGINATING SUMMONS.

By her will, dated the 12th April, 1911, Annette Smith appointed John Robert O'Connell and Laurence O'Higgins her executors and trustees, and having recited that under her father's will and her own marriage settlement she had certain powers of

appointment over certain property, including an undivided fourth part of certain lands, and was also absolutely entitled to other property, devised and bequeathed to her trustees all her property, real and personal, which she was entitled to or had any disposing power over, and appointed the said undivided fourth part of the lands to her daughters Mercy Smith, Florence Walsh, and Leah Thompson, in equal shares, for their respective lives, and from and after their respective deaths to such person or persons as they should by deed or will appoint. The testatrix also directed that her trustees should set apart two sums of £1000 each, and hold one such sum upon trust as from twelve months from testatrix's death (subject to the proviso thereinafter appearing) to pay the income to Mercy Smith for life, and after her death on trust for her children or remoter issue as she should by deed or will appoint, and in default of appointment for her children or remoter issue equally, and in default of issue as to one moiety in trust for Florence Walsh for life, with similar power of appointment in her and a similar gift to her issue in default of appointment, and as to the other moiety in trust for Leah Thompson for life, with a similar power of appointment in her and similar gifts to her issue in default of appointment, and in the event of Leah Thompson dying without leaving issue her surviving, on the same trusts as those declared concerning the first moiety, and as to the other sum of £1000 upon trust (subject to the proviso thereinafter appearing respecting it and the limitations thereof) for Leah Thompson for life, and after her death for her issue upon the same limitations in favour of her issue as those expressed concerning the first sum of £1000 in favour of the issue of Mercy Smith, and, if the said Leah Thompson should die without leaving issue her surviving, then as to one moiety of the said second sum of £1000 in trust for Mercy Smith for life if she should survive Leah Thompson, and after her death for her issue upon similar trusts as those thereinbefore expressed concerning the £1000 limited upon trust for Mercy Smith and her issue, and if Mercy Smith should die without leaving issue her surviving on the like trusts as those thereinbefore expressed concerning the first moiety of the first sum of £1000 directed in the event of Mercy Smith dying

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without leaving issue, and as to the other moiety of the second sum of £1000 in trust for Florence Walsh and her issue on the same trusts as were expressed concerning the first moiety of the first sum of £1000 in the event of the death of Mercy Smith without leaving issue.

Later in the will there was the following proviso:—"Provided always and it is hereby expressly declared that it is my express desire and direction that each of my said daughters Mercy Smith and Leah Thompson shall within the period of one year after my death execute with all necessary formalities and so as to be of full binding effect and force in law respective settlements of all the respective shares or interests to which each of them the said Mercy Smith and Leah Thompson shall have become entitled under or by virtue of this my will . . . to be by such settlement or settlements assured and limited upon similar uses and trusts to the trusts hereinbefore expressed and declared concerning the two several sums of £1000 hereinbefore directed to be held by my trustees and hereby limited upon trust for my said daughters Mercy Smith and Leah Thompson and their respective issue with like remainders over respectively. And I hereby direct and declare that in the event of either or both of my said daughters Mercy Smith and Leah Thompson neglecting or declining within the period before mentioned to carry out the last hereinbefore expressed desire and direction then I direct and declare that all and every the beforegoing trusts hereinbefore declared of and concerning the respective life estates in all the said sums of £1000 respectively limited in any such sum of £1000 or the investments representing the same in favour of any such daughter neglecting and declining to carry out my said desire and direction and all ulterior trusts thereof hereinbefore declared shall be deemed as of no effect and absolutely void and I declare that in such event any such sum of £1000 or the investments representing the same and the interest and dividends thereof as from the date of my death shall be held and applied by my trustees upon the like trusts as are hereinbefore expressed of and concerning the first-mentioned moiety of the first-mentioned sum of £1000 in the event of my said daughter Mercy Smith dying without leaving issue for the benefit of my said daughter Florence Walsh and her issue."

The 14th clause of the will was as follows:—"I desire that the firm of the said John Robert O'Connell shall act as solicitors in reference to the proving of this my will, the carrying into execution of the trusts thereof, the preparation and execution of any deeds to be executed for the purpose of carrying out my desire and intention hereinbefore expressed in relation to the appointed shares of my said daughters Mercy Smith and Leah Thompson and the realization and distribution of my estate and I declare that the said John Robert O'Connell shall be entitled to charge and to be paid (notwithstanding his position as executor and trustee of this my will) his full professional and other and customary charges for any business done by him or by his firm as solicitor or solicitors in the premises including the receipt and payment of any money, rents, income, or dividends whether in the ordinary course of his profession or business as such solicitor or not and although not of a nature requiring the employment of a solicitor."

The testatrix died on 20th February, 1914, and probate of her will was duly granted to the executors therein named.

It appeared from an affidavit sworn by the said executor, Sir John Robert O'Connell, one of the firm of Thomas F. O'Connell & Son, solicitors, that on 22nd February, 1914, and in March, 1914, he had interviews with Mrs. Leah Thompson, on the first of which occasions he fully read and explained to her and also to her sister, Mercy Smith, who accompanied her, the will and the effect of it; that he had another interview with Mrs. Leah Thompson in March, 1914, when she was accompanied by her sister, Mrs. Florence Walsh, when she conveyed that she was willing to sign any document which he might put before her; she did not instruct him to prepare any particular document, but expressed a general willingness to sign any document which he might prepare and send to her for execution, by which he understood her to refer to the settlement mentioned in the will. Neither Mercy Smith nor Leah Thompson ever executed such a settlement as that mentioned in the will. More than two years had elapsed since the death of testatrix.

The estate was insufficient to pay in full the legacies bequeathed by the will.

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J. Creed Meredith, for plaintiffs:—

Assuming that the clause as to profit costs created a legacy in favour of Sir John O'Connell, the legacy was one giving him executor's costs, which costs take priority over other legacies, and the intention of the testator can only be carried out by treating the legacy as in priority. This is not an insolvent estate, though the legacies cannot all be paid in full.

W. Gibson K.C., for Florence Walsh:—

Sir John Robert O'Connell is not entitled to claim profit costs in priority to the legacies given by the will. *In re Barber* (1) decides that when an estate is insolvent, a solicitor executor, who was an attesting witness, cannot as against creditors make any claim for profit costs. *In re Barber* (1) was approved of in *In re Pooley* (2). In *In re Thornley* (3) there was a trust for trustees to carry on a business, each to receive £250 annually out of the profits thereof, and the gift was held to be a legacy; and so a declaration that a solicitor may charge for profit costs is a legacy within sect. 15 of the Wills Act. *In re White* (4) decides that a solicitor executor or trustee is not entitled to his profit costs of acting as solicitor to the estate if it turns out to be insolvent, even though the will contains the usual clause empowering him to charge for work done; and the principle of that decision governs the present case.

The legatee has not complied with the condition, and the gift over takes effect. A condition of forfeiture like this will be construed strictly, and the Court will not relieve where there is a gift over, and the interest of a third party is involved. It was not incumbent on Sir John O'Connell to advise as to execution of the deed or to prepare any particular document for execution. The evidence shows that the legatee did not bind herself to sign anything, and she has allowed two years to elapse without doing anything. She made a vague offer to sign anything; she put the matter off for a convenient season, which never came. Even though a condition is not performed owing to ignorance as

(1) 31 Ch. Div. 665; 34 Ch. Div. 77, 81.
(2) 40 Ch. Div. 1.
(3) [1891] 2 Ch. 613.
(4) [1898] 1 Ch. 297; 2 Ch. 217.

to its existence, forfeiture takes effect where the property is given over: *In re Hodges' Legacy* (1); *Astley* v. *Earl of Essex* (2); *Powell* v. *Rawle* (3); *Porter* v. *Fry* (4); *Priestly* v. *Holgate* (5); *Hawkes* v. *Baldwin* (6); *Burgess* v. *Robinson* (7); *In re Lewis* (8).

Murnaghan, for Leah Thompson :—

As to the first question. This is a legacy of profit costs to Sir John O'Connell as solicitor to the estate, and also trustee and executor of testator's will. A legacy can only come out of that part of the estate which is left after payment of debts and testamentary expenses. This estate is not insolvent, but it is insufficient to pay all legacies, and they must abate rateably. The ratio decidendi of the cases cited is that a clause like this giving profit costs to a solicitor trustee or solicitor executor creates a legacy with all the incidents of a legacy and nothing more. It cannot compete with creditors, and it cannot be paid in full where the assets are insufficient for that purpose.

As to the second question. I submit that Leah Thompson took a vested gift liable to be divested, the condition being a condition subsequent, and that there has been no forfeiture, and consequently that the gift over has not taken effect. Reading the will as a whole, the meaning is that the solicitor executor should advise Leah Thompson as to her position, and what she ought to do, and should prepare the necessary document for execution and submit the same to her for signature. Can it successfully be argued that the lady was to ignore clause 14 and sit down and draw up a settlement herself? There was no direct obligation cast on her of doing something of her own motion, the omission of doing which would have the effect of taking away the property already vested in her. "Neglect" means "wilful" neglect: *Re Conington's Will* (9).

No doubt ignorance or want of knowledge of the contents of a will in an ordinary case is not an excuse for non-compliance with its provisions, as was held in *Astley* v. *Earl of Essex* (2) and other cases, but here the solicitor executor was burthened with the duty

(1) L. R. 16 Eq. 92.
(2) L. R. 18 Eq. 290.
(3) L. R. 18 Eq. 243.
(4) 1 Vent. 199.
(5) 3 K. & J. 286.
(6) 9 Sim. 355.
(7) 3 Mer. 7.
(8) [1904] 2 Ch. 656.
(9) 8 W. R. 444.

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of having things prepared for the performance of the condition to avoid forfeiture, and that class of case has no application. There was, undoubtedly, no de facto execution. But the legatee certainly did not refuse, for she said she would execute, and she cannot be said to have neglected. "Neglect" means "wilful neglect": *Re Conington* (1). The fact of non-execution of the deed is not the only thing to be looked at. If so cadit quaestio. The legatee took a definite step. She said she would take under the will and would execute any deed that was prepared for her by the solicitor-executor. He would be estopped from saying she had not elected to take under the will: *Egg* v. *Decy* (2). Until a legal instrument was prepared by the solicitor there was no neglect on her part. In *Partridge* v. *Partridge* (3) a condition defeating an estate if the taker refused or neglected to reside in a mansion house was held inapplicable to the case of an infant because the guardians were the proper persons to tell him where to reside; and see *Parry* v. *Roberts* (4); *Bevan* v. *Mahon-Hagan* (5); *Richmond Gas Co. & Richmond* (6) cited in Strand on "Neglect," pp. 1258, 1259. *In re Hodges' Legacy* (7) was a case of a condition precedent. In it the word "neglect" only was used. *In re Lewis* (8) is distinguishable.

Hubert Hamilton, for Mercy Smith:—

I adopt the argument of Mr. Murnaghan for Leah Thompson, as my client's position is precisely the same as hers. The person who is to have the deed executed is Sir John O'Connell. He is the person appointed for this particular purpose by clause 14 of the will. "Refusal" must mean some active refusal. The words "neglect or decline" point to an act of commission, not of omission. "Or" is to be read conjunctively and not disjunctively. Three lines further down the clause the words are "neglecting and declining." See *In re Salter*, *Rea* v. *Crozier* (9); *Hunter* v. *Attorney-General* (10).

(1) 8 W. R. 444.
(2) 10 Beav. 444.
(3) [1894] 1 Ch. 351.
(4) 19 W. R. 1000.
(5) 31 L. R. Ir. 342.
(6) [1893] 1 Q. B. 56.
(7) L. R. 16 Eq. 92.
(8) [1904] 2 Ch. 656.
(9) [1911] 1 I. R. 289.
(10) [1899] App. Cas. 309.

BARTON J.:—

Two questions remain for decision—1, whether the solicitor-executor's profit costs have any priority over other legacies; and 2, whether the condition upon which two legacies of £1000 were bequeathed has been complied with.

As regards the first question, reference was made to *In re White* (1), in which it was held by Kekewich J. and by the Court of Appeal that, in the administration of an insolvent estate, such profit costs cannot be claimed as against creditors, because they constitute a legacy, and a legacy cannot be paid until creditors are satisfied. In the present case the estate is not insolvent quâ creditors, but it is insufficient quâ legatees; and the question is whether these profit costs take priority of other legacies. I feel no difficulty in answering that question in the negative. The priority of trustee costs depends on the principle that a trustee's costs, charges, and expenses constitute a first charge or lien on the trust estate. This principle must not be misapplied so as to authorize a solicitor-trustee to earn profit costs out of the trust estate. For profit costs the solicitor in the present case has no lien; and, if he has no lien, he has no priority, because the will, upon which alone his right to profit costs can depend, does not give it to him.

I now turn to the second question. It is well settled that an executor is not bound to inform a legatee of a legacy or of a condition annexed to a legacy, and that ignorance on the part of a legatee of the condition is no excuse for non-compliance: *Lady Anne Fry's Case* (2); *Hodges' Legacy* (3); *Powell* v. *Rawles* (4); *Astley* v. *Earl of Essex* (5); *Horrigan* v. *Horrigan* (6); *In re Hartley* (7); *In re Lewis* (8). In the present case the will was fully read to the legatees, and was fully explained to them. They were not under any incapacity, such as in *Partridge* v. *Partridge* (9) rendered an infant incapable of neglecting to choose a place of residence. The case is stronger than *Hodges' Legacy* (3) and *Astley* v. *Earl of Essex* (5), where there was a total ignorance of

(1) [1898] 1 Ch. 297; [1898] 2 Ch. 217.
(2) 1 Vent. 199.
(3) L. R. 16 Eq. 92.
(4) L. R. 18 Eq. 243.
(5) L. R. 18 Eq. 290.
(6) [1904] 1 I. R. 29.
(7) 34 Ch. D. 742.
(8) [1904] 2 Ch. 656.
(9) [1894] 1 Ch. 351.

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the existence of the condition. Accordingly, the case resolves itself into the question whether there is any distinguishing feature in the will or in the facts.

In Mercy Smith's case, as there is no distinguishing fact, Mr. Hamilton was driven to argue that the words "neglect or decline" should be read "neglect and decline"; and he was able to point, in support of his argument, to the subsequent referential words "so neglecting and declining." But I cannot see my way to change the terms of the condition which the testator imposed. The referential words must, I think, be read conformably with the primary words to which they are relative.

In Leah Thompson's case Mr. Murnaghan relied upon a conversation with Sir John O'Connell, the solicitor executor, taken in connexion with the profit costs clause (No. 14) in the will. As regards the latter clause, I cannot read into it the wide significance which it was sought to attach to it. It is not unusual for a testator to direct that a particular solicitor should act for the estate, and in *In re White* (1) there was a direction to that effect. I cannot say that he was bound to advise Leah Thompson and Mercy Smith on the one hand, or Florence Walsh, the legatee, on the other hand. I infer that the legatee, although the will was read and explained to her, did not clearly understand it, and did not concern herself to ask questions, or to be advised as to her right, or as to the course which she should pursue. She expressed herself willing to sign any document that Sir John O'Connell might submit to her, and I assume that this offer would cover the settlement in question. But, as Sir John O'Connell observes, she did not bind herself to sign anything. She might have refused to sign, if it had been submitted to her, and she might refuse to do so now if so disposed. She did not execute a settlement; nor did she bind herself to do so, which, it might be contended, would be equivalent to execution in equity. I assume in her favour the most entire bona fides on her part. Nevertheless, if it were to be held that a general offer to sign any document was equivalent to execution, a condition of this kind might be kept open for an indefinite number of years without creating any obligation upon the legatee to comply with it.

(1) [1898] 1 Ch. 297; [1898] 2 Ch. 217.

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However hard it may be, or may appear to be, in this particular case, I cannot hold that the legatee complied with this condition, and I am of opinion that the gift over has taken effect.

Solicitors for plaintiffs: *Thomas F. O'Connell & Son.*
Solicitor for the defendant Leah Thompson: *A. Robb.*
Solicitor for the defendant Florence Walsh: *A. Lane Joynt.*
Solicitor for Mercy Smith: *A. Lane Joynt.*

R. W. L.

HAHESY *v.* GUIRY (1).

Appeal
1918.
Jan. 17, 18.

Fraud on Settlement—Holding purchased under Land Purchase Acts by limited owner—Sale by Irish Land Commission to recover arrears of annuity—Collusion between owner of holding and purchaser at sale—Purchaser declared a trustee for persons entitled in remainder.

J. H. and H. H. (his wife) being entitled under a settlement executed on their marriage to a farm of land held under a tenancy from year to year for their joint lives, purchased the fee-simple of the lands under the Land Purchase Acts in 1888, and were subsequently registered as limited owners under the provisions of the Local Registration of Title (Ir.) Act, 1891. With a view to defeating the interests of those entitled in remainder under the settlement, J. H. and H. H. deliberately allowed the annuity payable to the Irish Land Commission to fall into arrear, and on the lands being put up for sale by the Irish Land Commission, any outside bidding was prevented, and the defendant (a nephew of H. H.), who was privy to the entire transaction, was declared the purchaser at the sale for a price which was only sufficient to pay the arrears of the annuity and did not represent the true selling value of the farm. The plaintiff represented those entitled in remainder under the settlement.

Held, by the Court of Appeal (affirming the decision of the Master of the Rolls), that the defendant was party to a fraud on the settlement, and could not retain for himself the benefit of the purchase.

APPEAL from the judgment of the Master of the Rolls in this action, reported [1917] 1 I. R. 371.

Thomas Hahesy, who was tenant of a farm of lands held under a yearly tenancy, by a settlement, dated the 26th February, 1884, executed on the marriage of his son, John Hahesy, with Honoria

(1) In the Court of Appeal, before SIR IGNATIUS J. O'BRIEN C., and RONAN and MOLONY L.JJ.

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Walsh, assigned the farm, and the stock and chattels thereon, to a trustee upon trust for John Hahesy and Honoria Walsh during their joint lives, or until the said John Hahesy should assign or attempt to assign the lands, or should become bankrupt, or suffer judgment to be recovered against him, and execution thereon levied; and upon the happening of any of the said events then upon trust to raise by sale or mortgage of the said lands the sum of £400, and hold the same in trust for the said Honoria Walsh. There was no provision for the issue of the marriage. The marriage took place, and in 1888 John Hahesy and his wife purchased the fee-simple of the lands under the Land Purchase Acts. Thomas Hahesy died in 1893 intestate, leaving him surviving as his next-of-kin his sons Thomas Hahesy (the plaintiff), John Hahesy, and James Hahesy. On the 18th May, 1904, John Hahesy and his wife were registered as limited owners of the lands under the provisions of the Local Registration of Title (Ireland) Act, 1891.

In 1908 John and Honoria Hahesy entered into an agreement with the defendant (a nephew of Honoria Hahesy) for the sale of the lands to him; but this sale was not completed owing to its being discovered that John and Honoria Hahesy were not absolute owners. In 1909, 1910, and 1911 the annuity payable to the Irish Land Commission was deliberately allowed to fall into arrear, the lands being cleared of stock, and let in grazing. On the 7th February, 1912, the lands were put up for sale by auction by the Irish Land Commission, and bought by the defendant for £140, a sum only sufficient to cover the amount of the arrears due on foot of the annuity, and in no way representing the selling value of the farm.

After the sale John Hahesy and his wife continued to reside on the farm with the defendant. Honoria Hahesy died on the 25th December, 1914, and John Hahesy on the 12th March, 1915. On the 1st December, 1916, the plaintiff obtained a grant of letters of administration of the personal estate of Thomas Hahesy, the settlor in the settlement of 1884, in whose favour there was a resulting trust of the lands.

There was evidence that the public were warned to keep away from the sale, and that the defendant was fully aware that it

was the intention of the Hahesys to defeat the interests of the remainderman.

The Master of the Rolls gave judgment for the plaintiff in the action, and made a declaration that the sale by the Irish Land Commission was procured by the collusion of the defendant with John and Honoria Hahesy; that the purchase by the defendant was a fraud on the persons entitled under the settlement to the lands in remainder expectant on the deaths of John and Honoria Hahesy; and that the defendant was, from the death of John Hahesy, on the 12th March, 1915, a trustee of the lands for the plaintiff as personal representative of Thomas Hahesy. Hence this appeal.

Serjeant Sullivan K.C. and *H. D. Conner K.C.* (*Sealy* with them):—

There is no evidence that the defendant was party to a conspiracy intended to defeat the interests of the remainderman. Knowledge of the intention of John Hahesy is not sufficient. A tenant for life is not a trustee for the remainderman: *Dicconson* v. *Talbot* (1). He may become a constructive trustee if he abuses his position as tenant for life, and thereby secures a benefit for himself; but in such case he is a trustee only in respect of the benefit so acquired. Here John Hahesy and his wife acquired no benefit for themselves, nor were they guilty of any breach of duty. They were under no obligation to keep down arrears of the annuity. This was not a purchase from a tenant for life, nor one of an estate subject to the trusts of a settlement. The defendant bought an absolute fee-simple estate discharged from all equities under the paramount power of sale of the Land Commission. He bought for himself, with his own money, and for his own benefit. He bought at a sale which could only take place under a statutory power, which could only come into existence if the annuity was in fact in arrear. He was not concerned with the motives which led to the annuity being allowed to go into arrear. It was because it was in arrear that the sale took place. The defendant stood in no fiduciary capacity to any person under the settlement or otherwise, and he in no way

(1) L. R. 6 Ch. App. 32.

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represented himself as standing in any such capacity, or obtained any benefit for himself by so representing. The Land Commission was not fixed with any trust. They sold with full knowledge of the facts, and of the value of the farm; but that does not make the sale by them a fraud. It is not, in any case, sought to set aside the sale. The question of under-value does not affect the principle involved. The principle would be the same if £5000 had been paid for the lands. [They also referred to *Soar* v. *Ashwell* (1).]

Serjeant Matheson K.C., *Healy K.C.*, and *A. V. Matheson* were not called upon to argue.

Jan. 18.

SIR IGNATIUS J. O'BRIEN C.:—

We do not require to hear counsel for the respondents. We are all of opinion that the judgment of the Master of the Rolls should be affirmed, and I shall state very shortly my reasons for this conclusion. It is perfectly clear from the evidence adduced at the trial that this old man, John Hahesy, and his wife, had determined deliberately to allow the instalments payable to the Irish Land Commission to go into arrear, with the object of bringing about a sale of the lands by the Land Commission, and thereby ensuring that the property should be lost to those entitled in remainder; and I am satisfied that this was intended to be carried out by arranging that there should be no open bidding at the sale. One of two persons was to obtain the benefit of that arrangement—John Hahesy himself or the defendant in this case. It is true that the defendant is not brought directly into privity with this arrangement, but I am clear that the Master of the Rolls was right in his finding that the sale was not an open sale—that there was to be no real bidding—but that the sale was to be rendered effective for the carrying out of the real object of the Hahesys, namely, to defeat the interests of the remainderman by ensuring that no more money should be bid for the lands than was sufficient to pay the arrears due to the Land Commission. If the sale had resulted in an adequate price being obtained, the remainderman would have reaped the benefit

(1) [1893] 2 Q. B. 390.

of it by getting the money, though deprived of the land; knowing, as he did know, that there was to be no real sale; knowing, as he did know, that the whole proceeding was one intended to destroy the interests of the remainderman, the defendant in my judgment made himself a party to this fraud on the settlement, and he cannot accordingly be allowed to retain for his own benefit the valuable interest in the lands which he so acquired.

It may be that the Master of the Rolls has gone somewhat too far in his judgment as to the obligation of a tenant for life to keep down arrears of an annuity; but it is unnecessary to deal with that point, having regard to my short view of the case. The appeal must be dismissed.

RONAN L.J.:—

I agree that the judgment of the Master of the Rolls ought to be affirmed, but I wish to be distinctly understood as doing so on the specific grounds stated by the Lord Chancellor.

MOLONY L.J. concurred.

Solicitors for the plaintiff: *I. Thornton & Son.*
Solicitor for the defendant: *Joseph F. Quirk.*

R. ST. J. C.

Appeal.
1917.
June 25.
July 18.
1918.
Jan. 24, 25.

FIELD, Deceased.
FIELDS *v.* FIELD.

Statute of Limitations, Realty—Rent accrued after extinction of title to tenancy—3 & 4 *Wm.* 4, *c.* 27, *ss.* 3, 34; 37 & 38 *Vict. c.* 37, *s.* 1; 23 & 24 *Vict. c.* 154, s. 14.

A. became owner by assignment in 1900 of a tenancy from year to year, and paid the rent due to his landlord until his death in 1914. During the whole of that period he had allowed B. to remain in possession of the premises without paying any rent or giving any acknowledgment of A.'s title. The landlord having made a claim in the administration of A.'s estate for rent accrued due subsequent to his death:

Held, 1 (by the Court of Appeal, reversing the decision of O'Connor M.R. on this point), that the landlord was not entitled to recover any rent which accrued after A.'s interest had been destroyed by force of the Statutes of Limitation; 2 (by O'Connor M R. and the Court of Appeal), that the tenancy did not form part of A.'s assets.

Summons.

John Field, the deceased in this matter, in the year 1900 purchased certain premises, held as a yearly tenancy on the estate of the Earl of Darnley, from the assignees in bankruptcy of Margaret Ryan, the former tenant, and the premises were duly assigned to him on the 14th June, 1900. From that date until his death in 1914 John Field paid the rent due to the landlord, but he never got up possession from the former tenant, who remained in possession for more than twelve years without ever paying any rent or giving any acknowledgment of his title. In the administration of John Field's estate the trustees of the will of the Earl of Darnley made a claim for two and a-half years' rent of the premises, due to the 1st May, 1917. The chief clerk having disallowed the claim, the present summons was brought for an order that the chief clerk's certificate might be varied by re-inserting and allowing the said claim, and by setting out the said premises as part of the outstanding estate of the deceased.

Cecil Fforde, for the applicants, the trustees of the will of the Earl of Darnley.

Poole, for the plaintiff:—

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The estate of the deceased in these premises was destroyed by force of the Statutes of Limitation: there is now no privity of estate between the personal representatives of the deceased and the applicants; they have, therefore, no right to bring what is in effect an action of debt against his estate. The action of debt is based on privity of estate: *Tovey* v. *Pitcher* (1). No notice of assignment, as provided by sect. 14 of Deasy's Act, could have been given, because there was no assignment. [He referred to *Rankin* v. *M'Murty* (2); *Tichborne* v. *Weir* (3); *Adnam* v. *Sandwich* (4); *Taylor* v. *Shum* (5); *Irish Land Commission* v. *White* (6); *O'Connor* v. *Foley* (7).]

E. S. Murphy, for the defendants.

Cur. adv. vult.

July 18.

O'CONNOR M.R.:—

In this matter a claim was brought in against the estate of the deceased by the trustees of the Earl of Darnley for rent due out of premises in the village of Ballivor, County Meath, held by the deceased as a yearly tenant to the trustees. The amount involved is small, but the claim involves a nice question of law.

The premises were formerly held by one Margaret Ryan from the Earl of Darnley or his trustees, under a yearly tenancy subject to the yearly rent of £7 18*s*. The tenant became a bankrupt in or about the year 1900, and the tenancy was put up for sale in the Bankruptcy Court and purchased by the deceased in this matter, and a conveyance of the tenancy was made to him on the 14th June, 1900, by the official assignee. There was then some rent in arrear due to Lord Darnley or his trustees, but this was cleared off up to the 1st May, 1900. From that date down to the 1st November, 1914, the rent was paid by the deceased to Lord Darnley's trustees, and their claim now is for rent which has since accrued due. So far there is no complication, but it appears that, although the deceased got a conveyance of the

(1) Carth. 177.
(2) 24 L. R. Ir. 290.
(3) 67 L. T. N. S. 735.
(4) 2 Q. B. D. 485.
(5) 1 B. & P. 21.
(6) [1896] 2 I. R. 410.
(7) [1906] 1 I. R. 20.

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O'Connor M. R.

premises in 1900 and paid his purchase-money, and out of his own moneys kept down the rent payable to Lord Darnley's trustees, he did not get up possession from the bankrupt, who was in occupation, exacted no rent from her, and never got from her any acknowledgment of title, with the result that she or her successors in title have now a good title under the Statute of Limitations as against the deceased's representatives; and the title of the deceased became barred before the rent claimed became due. This, it is said, affords a good answer to the claim, because the deceased became liable for the rent only as assignee of the tenant's estate, and was only liable so long as that estate remained vested in him, and ceased to be liable when he lost the estate under the statute.

It is undoubtedly true as a general proposition that an assignee of a tenancy only remains liable for rent for so long as the tenant's estate is vested in him. It is on this ground that the claim is resisted. It is argued that whether the effect of sect. 34 of 3 & 4 Wm. 4, c. 27, is to work out a conveyance to the person in adverse possession as decided in *The Incorporated Society* v. *Richards* (1) by Lord St. Leonards, or only to extinguish the title of the person out of possession, which is now the accepted interpretation of the statute: *Tichborne* v. *Weir* (2); *O'Connor* v. *Foley* (3); *Nisbet and Potts' Contract* (4), the title of the deceased as assignee determined before the rent claimed fell due, and his liability thereupon ceased. If this is so the Statute of Limitations works out a result unexpected and even startling, because it bars the title of a lessor who has been duly and punctually paid his rent up to the gale day from which the gale which last accrued due commenced to run. The purport of the statute was to bar the rights of persons who for a certain period of time failed to enforce them. Must we so construe it as to prejudice the paramount rights of persons who have been diligent in enforcing them, and have been careful not to allow the prescribed time to elapse before doing so? Let us see how this is.

The material enactments are:—Sect. 1 of the Real Property Limitation Act, 1874, and sects. 3 and 34 of the Act of 1833.

(1) 1 Dr. & W. 258.
(2) 69 L. T. N. S. 735.
(3) [1906] 1 I. R. 20.
(4) [1905] 1 Ch. 391.

Sect. 1 of the Act of 1874 prescribes that no land or rent shall be recovered but within twelve years after the right of action accrued. By sect. 3 of the Act of 1833, the right of action shall be deemed to have first accrued in the case of a person who has been in possession or receipt of rents when he shall have been dispossessed or discontinued the receipt of the rents, and in the case of a person claiming under a grant, when such person or the person through whom he claims became entitled to such possession or receipt. Sect. 34 of the Act of 1833 prescribes that at the end of the period of limitation the right of the party out of possession or not in receipt of the rents shall be extinguished.

Now apply these sections to the present case. On the 14th June, 1900, the deceased in this matter acquired by conveyance the estate of Margaret Ryan which gave him the right to immediate possession. He did not get up possession, and time was running against him. The period of limitation expired on the 14th June, 1912, and from that date his title was extinguished. Up to the 14th June, 1912, his title remained unaffected. He remained for so long the legal owner of what was Margaret Ryan's estate, viz.—a tenancy under Lord Darnley's trustees at a yearly rent. That rent was paid by the deceased up to the 14th June, 1912—that is paid to the landlords by the person who was the owner of the tenant's estate. So far then the rights of the trustees are not touched by the Act. The right of the deceased, no doubt, became extinguished by sect. 34 of the Act of 1833, but I can find nothing in it which extinguishes the right of a person who does not come within sect. 1 of the Act of 1874, or sect. 3 of the Act of 1833. Sect. 34 only extinguishes the right of the person who fails to bring the action to recover the land or rent, and not the paramount right of another person who has duly received his rent from the person liable to pay it. It is clear, then, that the right of the trustees of Lord Darnley to recover the rent claimed is not directly touched by the statutes, they having received rent from the person liable to pay up to a date well within the period of limitation.

It may be said, however, that indirectly the right of the trustees is barred, for if it is not we have the legal anomaly of a liability for rent on the assignee of a tenancy notwithstanding

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that his estate as assignee had determined before the rent accrued due. That may be so; but the alternative is the barring of a right to recover rent although there has been no failure to recover it in due course, and no notice to the landlords that the title of the person paying has been extinguished by his own default—a result which was certainly never contemplated by the framers of the statutes, and too unjust to be admitted without some positive enactment, as the indirect and unthought of legal consequence of the secret extinguishment of the tenant's estate.

For these reasons I hold that the claim of the trustees of Lord Darnley for rent due ought to be admitted.

There is a further point for decision: whether the tenancy purchased by the deceased should be found to be part of his assets. In my opinion it should not be so found, because the deceased's title to the tenancy has been extinguished.

That is really all I have to decide at present, and all I intend to decide. It may be that the rights of the trustees to future gales of rents may be affected by the notice they have got that the deceased's estate has been extinguished. It may be that they may find themselves obliged to have recourse to an ejectment for nonpayment instead of a personal claim for rent, and then the interesting question may arise whether an estate which has been extinguished for all the purposes of enforcing rights appertaining to it, may not yet be alive for the purpose of enforcing a paramount right against it. This may prove to be a highly interesting legal problem, in which the strictly legal consequences of the doctrine of *Tichborne* v. *Weir* (1) may be pressed irrevocably to one conclusion, while, on the other hand, the limitations placed upon it by FitzGibbon L.J. in *O'Connor* v. *Foley* (2) may lead to another. I leave these questions for a future occasion.

A. H. W.

(1) 67 L. T. N. S. 735.

(2) [1906] 1 I. R. 20.

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The plaintiff appealed to the Court of Appeal (1) from so much of the order of the Master of the Rolls as allowed the claim of the trustees of the landlord for two and a-half years' rent, and there was a cross-appeal by the trustees from so much of the said order as refused to insert the premises purchased by John Field in 1900 in the schedule of outstanding personal estate of the deceased.

Meredith K.C. (with him *Poole*), for the appellant, the plaintiff:—

The Master of the Rolls held—1, that the Statute of Limitations had run against John Field on June 14th, 1912, and that his right and title were thereupon extinguished under sect. 34 of the Real Property Limitation Act, 1833; 2, that, nevertheless, John Field's estate continued liable for and must pay to the landlord two and a-half years' rent from 1914 to 1916. The extinction brought about by sect. 34 is absolute, and not merely relative to the person in possession; the right and title to the land are extinguished. But such right and title were the foundation of the deceased's liability for rent. In this case there was no privity of contract; the deceased was assignee; and when he ceased to be assignee of the holding, he ceased to be liable for the rent. The common law on the subject is stated in *Pitcher* v. *Tovey* (2) and *Taylor* v. *Shum* (3).

Sect. 14 of the Landlord and Tenant Act (Ireland), 1860, no doubt requires notice of an assignment to be given to the landlord to make such assignment operative as a release from liability for rent; but assignment in the proviso to that section means assignment by deed or note in writing inter vivos, and does not include extinguishment of right and title by statute: *Powell* v. *Adamson* (4). It is unnecessary to go into the question discussed in *Tichborne* v. *Weir* (5) and *O'Connor* v. *Foley* (6). Whatever be the true view of the operation of the statute, the liability must be extinguished with the right.

(1) In the Court of Appeal, before SIR IGNATIUS J. O'BRIEN C., and RONAN and MOLONY L.JJ.

(2) 1 Salk. 81.
(3) 1 Bos. & F. 21.
(4) [1895] 2 I. R., at p. 53.
(5) 67 L. T. 735.
(6) [1906] 1 I. R. 20.

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Jellett K.C. (with him *Fforde*), for the trustees of the landlord:—

There is no evidence in the case, of adverse possession by Margaret Ryan. The deceased having continued to pay rent on the basis of the relation of landlord and tenant for fourteen years, down to 1914, including two years after the date at which the Statute of Limitations is said to have taken effect, his personal representative is estopped from saying that he is not tenant and still liable for rent. For the recognized propositions relating to estoppel see *Carr* v. *London and North-Western Railway Co.* (1). The rights of a landlord cannot be affected by the conduct of third parties, unless he is guilty of some neglect or default: *Adnam* v. *The Earl of Sandwich* (2); *Irish Land Commission* v. *White* (3).

Counsel for the plaintiff were not called upon to reply.

SIR IGNATIUS J. O'BRIEN C.:—

This case comes before us on an appeal and cross-appeal from an order of the Master of the Rolls made upon an application by the trustees of Lord Darnley, claiming, first, a sum for rent in respect of the estate of John Field which is being administered in the Court below, and, secondly, to treat the lands out of which this rent is claimed as assets of the deceased.

The application made to the Court below was unquestionably of a very unusual character; and so far as I know it is the first application of the kind made in administration proceedings. I hope it will be the last, because it is not in accordance with elementary justice that the Court should be asked to decide a question of title adversely to the person who may in fact be the owner of the premises in his absence.

There are two questions involved: one a question of fact and the other a question of law. The property in question was a tenancy from year to year in a publichouse. Margaret Ryan, the former owner of the tenancy, became bankrupt, and John Field purchased the interest in the tenancy from the assignees in bankruptcy. The landlord was willing that John Field should become

(1) L. R. 10 C. P. 307, at pp. 316, 317.

(2) 2 Q. B. D. 485, at p. 490.

(3) [1896] 2 I. R. 410, at pp. 416, 417.

purchaser, but no point turns on this, inasmuch as there was no prohibition against alienation. In ordinary circumstances when property of this character is sold, the landlord, if he objects to the incoming tenant, may determine the tenancy by notice to quit. As a matter of practice, however, the assignees in bankruptcy usually ask the landlord whether he will accept the purchaser.

John Field having become owner of the tenancy from year to year, paid the rent regularly down to the date of his death, which occurred in 1914; but he had allowed Margaret Ryan, who was succeeded by her son, to retain possession of the premises. She never paid any rent to him or to anybody else; and, prima facie, she would on May 23rd, 1912, have acquired by force of sect. 34 of the Real Property Limitation Act, 1833, a title against John Field. The question raised here is that, notwithstanding the cesser of the estate and interest of John Field—if the non-payment of rent by Margaret Ryan has that effect—the landlord is entitled to make the estate of the deceased liable for ever for the rent of the tenancy from year to year. This claim, if admitted, would lead to a very singular state of affairs.

It is necessary for us to see whether, in the first instance, there was evidence to support the conclusion that the statute had, in fact, run. If the affidavits sworn both on behalf of the landlord and the personal representative of John Field are to be taken as proving the facts mentioned therein, no court could hold that in the year 1914 John Field's estate in these particular premises had not been destroyed. The only difficulty in connexion with this branch of the case is that instead of evidence such as would be required at a trial the affidavits are based on information and belief only; but the information and belief are clear on the point that after the purchase of the tenancy by John Field he paid the rent to the landlord and never received a penny from Margaret Ryan; that she and her son continued in occupation, and that the statute had run against Field.

The question which has arisen ought to have been determined upon strict evidence, but as the parties seem to have been content that it should be decided on affidavits before the Master of the Rolls and no exception was taken, I do not think it lies upon us to direct a stay of proceedings in order that the point may be raised

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in a more appropriate form. It has been said that an objection was made in the Court below on the ground that there was no evidence, but there is no trace of such objection in the judgment of the Master of the Rolls.

It is, I think, clear that the Statute of Limitations did run as between Mrs. Ryan and John Field.

The question of law in the case depends upon two sections—one in Deasy's Act (1) and the other in the Real Property Limitation Act, 1833 (2). Sect. 14 of Deasy's Act provides that: "No landlord or tenant, being such by assignment, devise, bequest, or act and operation of law only, shall have the benefit or be liable in respect of the breach of any covenant or contract contained or implied in the lease or other contract of tenancy, otherwise than in respect of such rent as shall have accrued due, and such breaches as shall have occurred or continued subsequent to such assignment, and whilst he shall have continued to be such assignee: Provided, however, that no assignment made by any assignee of the estate or interest of any tenant shall discharge such assignee from his liability to the landlord, unless and until notice in writing of the particulars of such assignment shall have been given to the landlord." Neither this section nor sect. 12 of Deasy's Act creates any privity of contract between the assignee of a tenant and the landlord. As between the original landlord and tenant the relation is, by section 3 of the Act, founded on contract; and, although an assignee is made liable in respect of rent, he is not in the position of a tenant who takes direct from the landlord. In the case of an assignee of the tenant there is no privity of contract; while, in England, as I understand, where there is no statute like Deasy's Act, there is no privity of estate.

Sect. 34 of the Real Property Limitation Act, 1833, enacts that: "At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent advowson, for the recovery whereof such entry, distress, action or suit respectively might have been made or brought within such period, shall be extinguished." By this the right is extinguished; and once it is extinguished

(1) 23 & 24 Vict. c. 154. (2) 3 & 4 Will. 4, c. 27.

there is an end to the liability for rent. It was suggested that the proviso at the end of sect. 14 of the Act of 1860 prevents the operation of the section unless and until notice of assignment shall have been given to the landlord; but that proviso refers to an assignment by act inter vivos. If this were not so, the startling result would follow that when the estate was destroyed by operation of law the man whose estate was gone would have to assign what had ceased to have existence, and give notice of assignment to the landlord.

I am satisfied that under the two sections to which I have referred the landlord is not entitled to any rent which accrued after the estate and interest of John Field had been annihilated by force of the statute of 1833. It has been sought to establish the liability of the plaintiff to rent on the ground of estoppel; but the fact that he paid rent during two years following the extinguishment of his tenancy by operation of law, there being no trace of consideration for that payment, cannot make his estate permanently liable. The order of the Master of the Rolls on this branch of the case must be reversed.

RONAN L.J.:—

There is no doubt about the law. The assignee of the original tenant is only liable for rent so long as the term is vested in him. His liability ceases when the term ceases to be vested in him. The provisions of Deasy's Act reproduce in statutory form this rule of the common law.

In this case the Statute of Limitations does not apply directly as between landlord and tenant, but it applies indirectly to the plaintiff's claim by its operation in putting an end to the assignee's estate, and, therefore, to his liability.

The Master of the Rolls concludes his judgment as follows:— "For these reasons I hold that the claim of the trustees of Lord Darnley for rent due ought to be admitted. There is a further point for decision: Whether the tenancy purchased by the deceased should be found to be part of his assets. In my opinion it should not be so found, because the deceased's title to the tenancy has been extinguished." From the moment the case was opened I could not understand how these two findings could stand together.

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The first question to be decided is: Was the title of the deceased to the tenancy extinguished by the statute? The Master of the Rolls has found that it was, but, at the same time, he held that the landlord was entitled to the rent. It seems to me that it follows if we accept the finding of the Master of the Rolls as to the extinguishment of the title of the assignee that the landlord has no right to the rent.

On June 14th, 1912, the title of the deceased to the tenancy was by operation of the Statute of Limitations extinguished, but for two years following rent was paid by him. Mr. Jellett says that the payment of rent in these circumstances induced the landlord in some way to alter his position, and that by the law of estoppel the representatives of John Field are bound for ever to pay the rent. I am unable to find anything in the case to support the contention as to estoppel. For these reasons I concur in the judgment of the Lord Chancellor.

MOLONY L.J.:—

There are two questions in this case; namely, had Margaret Ryan acquired a title against John Field, and if so, had the right of the landlord to recover rent from John Field been extinguished? The case depends on the evidence given in Chambers and before the Master of the Rolls. In many instances it is not possible to give in Chambers the strict legal evidence required in ejectment proceedings. Consequently, evidence on information and belief is not only allowed, but is sometimes the only evidence. In this case the source of the information is stated, and there is no material difference between the affidavits of James Fields, the plaintiff, and Claude P. Coghill, the agent of the landlord.

The Master of the Rolls had on the evidence before him to determine the rights of a person who was not a party to the proceedings; but it was quite open to him either to have directed the administrator to take substantive proceedings by ejectment or otherwise, or to have allowed proceedings to be taken by Lord Darnley's trustees. However, the whole case proceeded upon the basis that the Master of the Rolls was not asked to direct any such proceedings, but had to decide the questions raised as best he

could on the evidence before him. I am satisfied that upon the evidence he was justified in finding that the Statute of Limitations had run against John Field, and in favour of Margaret Ryan on June 14th, 1912. The effect of this was to extinguish the title of the deceased to the tenancy, under sect. 34 of the Real Property Limitation Act, 1833; but, not being conversant with the provisions of the statute, John Field continued to pay rent until November 1st, 1914; and it is contended that he having paid rent during the two subsequent years his estate is now liable for the rent up to the present date, and will continue liable in the future.

It is clear from sect. 14 of the Landlord and Tenant Law Amendment (Ireland) Act, 1860, that a person remains liable as assignee only so long as he is assignee, and that when he ceases to be assignee he ceases to be liable to rent. There is a proviso to sect. 14 which makes him liable until notice in writing of the assignment has been given to the landlord, but the proviso applies only where there is an assignment inter vivos, that is, by act of party as distinct from act of law: *Powell* v. *Adamson* (1), per Gibson J., at p. 53. The order of the Master of the Rolls, in so far as it allows the claim of the trustees of Lord Darnley for two and a half years' rent, must be reversed; but I am satisfied that he was right in holding that the tenancy did not form part of the outstanding personal estate of the deceased. In these circumstances the proper order to make is to discharge the order of the Master of the Rolls in so far as it allows the claim of the trustees for rent and awards them costs, and in lieu thereof to order that the claim be disallowed, and that the order of the Court below, refusing to include the tenancy in the outstanding estate, be affirmed. The plaintiff must have his costs, but the appeal and cross-appeal should be treated as one appeal.

Solicitors for the appellant, the plaintiff: *White & White.*

Solicitors for the trustees of Lord Darnley: *Montgomery & Chaytor.*

C. L.

(1) [1895] 2 I. R. 41.

M. R.
1917.
Dec. 12, 13.
1918.
Jan. 22.

In re DRISCOLL, Deceased.
DRISCOLL *v.* DRISCOLL.

Landlord and tenant—Breach of covenant to repair—Measure of damages—Defence of the Realm (Amendment) No. 2 Act, 1915 (5 *Geo. 5, c. 37), sect. 1, sub-s. 2—Defence of the Realm Regulation* 8E—*Fire Insurance—Subrogation.*

Certain premises were demised to A by a lease of 1866, which contained a covenant by the lessee to keep the premises in repair. A, by a lease of 1883, containing a similar covenant, sub-demised the premises to B. A and B had each insured the premises against loss by fire. On the 24th January, 1915, the premises were burnt down. Both A and B had been paid the full amounts of their respective claims by the Insurance Companies, which were not sufficient to reinstate the premises. A made a claim against the estate of B for damages for breach of the covenant to repair. A's Insurance Company claimed to be subrogated to his rights against B's estate, irrespective of whether A had been fully indemnified against the loss sustained or not.

Held, that until the insured had been fully indemnified he was not bound to contribute anything to the Insurance Company.

The measure of damages for breach of a covenant to repair where the premises have been totally destroyed, and the effect of the Defence of the Realm (Amendment) No. 2 Act, 1915 (5 Geo. 5, c. 37), sect. 1, sub-s. 2, and Regulation 8E made thereunder, considered.

MEMORANDUM.

By a lease, dated the 12th June, 1866, the Rev. Maurice F. S. Townsend demised to the claimant, Frances Henry Marmion, certain premises in Skibbereen for the term of ninety-nine years, from the 1st May, 1866, at the yearly rent of £20. The lease contained, in addition to the usual covenant for payment of the rent, a covenant that the lessee would during the continuance of the demise keep the demised premises in repair, and at the end of the term or sooner determination of the demise yield up possession to the lessor, his heirs, and assigns in like good and tenantable repair. By a sub-lease, dated the 31st December, 1883, and made between Thomas Henry Marmion, the Rev. Richard W. Marmion, and Henry R. Marmion, of the one part, and the deceased, Timothy Driscoll, of the other part, portion of the premises comprised in the lease of 1866 were demised to Timothy Driscoll for

the term of seventy years from the 1st November, 1882, at the yearly rent of £32. This lease also contained a covenant by the sub-lessee to keep the premises in repair during the term, and on the expiration thereof so to yield up the same to the lessors. All the estate and interest of the lessors in the sub-lease had become vested in Thomas Henry Marmion. Neither lease nor sub-lease contained a covenant to insure, but Thomas Henry Marmion had insured the premises with the Liverpool, London, and Globe Insurance Company in the sum of £500. The sub-lessee mortgaged the premises to the Bank of Ireland, and he and the bank insured them against fire with the Guardian Insurance Company for £900. On the 24th January, 1915, the premises comprised in the sub-lease were almost wholly destroyed by fire, and both policies were paid in full. Timothy Driscoll died on the 28th January, 1915, and his estate was being administered by the Court. In the administration Thomas Henry Marmion put in a claim to have the covenant in the sub-lease to keep the demised premises in good and tenantable repair throughout the term specifically performed and the premises reinstated as in their former condition, or in the alternative for damages for breach of the said covenant. The Liverpool, London, and Globe Insurance Company also claimed that the estate of Timothy Driscoll was liable by subrogation to pay to the company the sum of £500 which they had paid to Thomas Henry Marmion under his policy with them.

Meredith K.C. and *Russell*, for Thomas Henry Marmion:—

In Ireland a landlord cannot compel his tenant or the insurance company to expend the sum payable under the policy in reinstating the premises; his only remedy is under the covenant to repair; the decision in *Leeds* v. *Cheetham* (1) is still law in Ireland. The measure of damages is the sum it would cost to reinstate the premises, taking into account the claimant's liability, of which the deceased had notice by recital in the sub-lease: *Metge* v. *Kavanagh* (2); *Conquest* v. *Ebbetts* (3). [As to the right of the insurance company, they referred to Halsbury, Laws of England, vol. xvii, p. 518: *Andrews* v. *Patriotic Insurance Company* (4).]

(1) 1 Sim. 146.
(2) I. R. 11 C. L. 431.
(3) [1896] A. C. 490.
(4) 18 L. R. Ir. 355.

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Serjeant M'Sweeny K.C. and *Moriarty*, for the plaintiff, the personal representative of Timothy Driscoll:—

Regulation 8E, made under the provisions of the Defence of the Realm (Amendment) No. 2 Act, 1915 (5 Geo. 5, c. 37), sect. 1, sub-s. 2, renders the performance of the covenant impossible, and affords a defence to an action for breach of covenant. In any event, the true measure of damages is the loss to the reversion: *Conquest* v. *Ebbetts* (1).

Gibson K.C. and *E. S. Murphy*, for the Liverpool, London, and Globe Insurance Company:—

The receipt signed by Thomas Henry Marmion was expressed to be without prejudice to any and every legal and equitable right capable of being enforced by the company by way of subrogation. The right of the company is to be indemnified to the extent of the full amount secured by the policy: Welford and Barry's Fire Insurance, p. 314; Halsbury, Laws of England, vol. xvii, 519; *Castellain* v. *Preston* (2); *Darrell* v. *Tibbitts* (3).

Meredith K.C., in reply:—

Regulation 8 E does not apply to damages for breach of contract: *Metropolitan Water Board* v. *Dick, Kerr, & Co.* (4). [He also referred to *Commercial Union Insurance Co.* v. *Lister* (5).]

Cur. adv. vult.

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Jan. 22.

O'CONNOR M.R.:—

This matter came before me to adjudicate upon a claim made by Mr. Thomas Henry Marmion, the landlord of premises held from him by the deceased, Timothy Driscoll, whose estate is being administered by the Court.

The lease is dated 31st December, 1883, and was made for a term of seventy years from the 1st November, 1882, at the yearly rent of £32. In addition to the usual covenant for the payment of the rent the lease contained a covenant by the lessee to keep

(1) [1896] A. C. 490.
(2) 11 Q. B. D. 380.
(3) 5 Q. B. D. 560.
(4) [1917] 2 K. B. 1; [1917] W. N. 352.
(5) L.R. 9 Ch. 483; 43 L.J. Ch. 601.

the premises in repair during the term, and on the expiration thereof so to leave and deliver up the premises to the lessor.

The estate and interest of the lessor is now vested in Mr. Marmion, and his right under the lease is to have the premises kept in repair during the term, so that the rent payable to him for the term may be secured, and to have the premises delivered up to him on the expiration of the term in as good a condition as they were in at the date of the lease. The tenant was not under any obligation to insure the premises against fire, and the landlord, Mr. Marmion, for his own protection insured them with the Liverpool, London, and Globe Insurance Company in the sum of £500. The tenant mortgaged the premises to the Bank of Ireland, and he and the Bank effected an insurance against fire with the Guardian Insurance Company for the sum of £900.

Mr. Marmion held the premises demised by the lease and other premises under a superior lease for the term of ninety-nine years from the 1st May, 1866, at the yearly rent of £20, and this lease contained a covenant by the lessee to keep the premises in repair and to deliver them up in good repair at the expiration of the term. Mr. Marmion is therefore under a similar obligation to his lessor as his lessee is to him.

This was the way matters stood on the 24th January, 1915, when the premises comprised in the sub-lease, dated the 31st December, 1883, were almost wholly destroyed by fire. Mr. Marmion made a claim against the Insurance Company on foot of his policy, and was paid by them the full amount thereof, viz., £500. The Bank of Ireland and the lessee also made a claim on foot of their policy, and they were paid the full amount, viz., £900.

In these circumstances two claims are now made—1, a claim by Marmion against the assets of the tenant for damages for breach of the covenant to keep the premises in repair; 2, a claim by the Liverpool, London, and Globe Insurance Company to be subrogated to Marmion's right against the deceased's estate.

I have no difficulty whatever about the legal principles which govern such claims. The claim of Marmion must in the first

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instance be considered quite apart from and independently of the policy effected by him. The fact that he recovered a sum of money from the Insurance Company does not affect his claim against the lessee's estate. That claim must be dealt with as if he had not effected any policy. But when the amount of the claim is ascertained and recovered, then under the doctrine of subrogation the Insurance Company will have a claim against it, but that raises a question not between the Company and the deceased's estate, but between the Company and the insured.

I will first deal with Marmion's claim. That is a claim for damages for breach of covenant, and the first thing to be settled is the measure of damages. That is to be ascertained by reference to the claimant's rights under the lease. What are they? There is firstly the right to receive rent during the term demised, and to have the security for the rent maintained; and there is, secondly, the right to have the premises delivered up at the end of the term in good condition. The loss sustained by the infringement of these two rights is the measure of damage. For instance, the total destruction of leasehold premises may result in the loss of the rent reserved by the lease save such part thereof as would represent the ground-rent. The damage then might fairly be estimated as the capital value of the difference between the rent and the estimated ground-rent payable during the term. But this would not be the whole damage, because there is the damage done to the lessor's reversion. How is this to be ascertained? One way would be to find in the first instance the cost of rebuilding the premises at the end of the term, and to find the present value of the amount which would only be payable at the end of the term, or the entire damage both in praesenti and in futuro might be measured by first ascertaining what was the saleable value of the claimant's interest in the premises before they were destroyed, and then the saleable interest after they were destroyed. Subtracting the latter from the former, we get a measure of damage fairly reliable. Other methods of computation might be adopted for the purpose of arriving at what in every case is the same question, viz., what damage did the claimant suffer? This is very clearly laid down by the Lord Chief Baron in *Metye* v. *Kavanagh* (1),

(1) I. R. 11 C. L. 431, p. 437.

where he points out some methods of calculation and then says:— "In one case or to one mind one mode, whilst in another case or to another mind another mode may appear more suitable; but in all the problem is the same, what was the amount of loss sustained by the plaintiff." Now, having made these observations, how does the case stand as to evidence of damage? I think that I am right in saying that the only evidence of damage given for the claimant is that contained in the affidavit of Thomas Connell, and he merely avers that the sum of £1550 at the least would be required for the purpose of rebuilding the premises. I have no doubt that in some cases the cost of rebuilding would be a fair measure of damages, but in the present case it obviously would not be, because apart from the buildings the site must be worth something. In one of the affidavits filed to resist the claim, the premises in their present ruined condition are valued at £18 per annum. If this is true what would be the result of fixing the damage at £1550? The claimant would get a sum of money which, invested at 5 per cent., would bring £77 10*s.* per annum. He would also have £18 per annum out of the premises—£95 10*s.* in all, while under the lease he is only entitled to £32. I think that this inflation of income would be enough to convince anybody that the award of a sum of £1550, as the price of restoring the premises, would be a fallacious measure of damages.

No doubt the cost of rebuilding the premises may be a guide to the damage done. For instance, as I have pointed out, the present value of the expenditure which it would be necessary to make at the end of the lease to rebuild the premises plus the capital value of the loss of all or part of the rent during the lease might be the true measure, but I have no materials for such a calculation.

The only other evidence is that given by the Insurance Company, but that is of a very vague character, and directed principally to the question of subrogation.

I have really no evidence on which I would be justified in assessing damages, and I think that this defect is to be explained by the fact that the minds of the rival parties were principally directed to the effect of the recovery by the claimant of the policy moneys. Indeed, at one time it appears to have been considered

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that the payment by the Insurance Company relieved the deceased's estate. Therefore I propose to adjourn the claim for damages to enable the parties to give such further evidence as they may be advised. I have indicated various modes of computation, but not for the purpose of showing what mode I will adopt. It was rather for the purpose of showing that there must be some method of calculation; but the claimant's expert witnesses must select their own.

It was contended by counsel for the plaintiff, who resists the claim in the interest of the deceased's estate, that it is not maintainable by reason of the Defence of the Realm (Amendment) No. 2 Act, 1915 (5 Geo. 5, c. 37), and the regulations made thereunder. The plaintiff, as I understand, relied on sect. 1, sub-s. 2, of the Act, which enacts that, "Where the fulfilment by any person of any contract is interfered with by the necessity on the part of himself or any other person of complying with any requirement, regulation, or restriction of the Admiralty or the Army Council under the Defence of the Realm Consolidation Act, 1914, or this Act, or any regulations made thereunder, that necessity is a good defence to any action or proceedings taken against that person in respect of the non-fulfilment of the contract so far as it is due to that interference."

The regulation made in pursuance of that section is to be found on page 67 of the Manual of Emergency Legislation, and is in paragraph 8E, which provides that "it shall be lawful for the Minister of Munitions by order to regulate or restrict the carrying on of building and construction work as hereinafter defined, and by such order to prohibit, subject to such exceptions as may be contained in the order, the carrying on of such work without a licence from the Minister."

In pursuance of that regulation an order was made on the 14th July, 1916, by the Minister of Munitions that no person should without licence from the Minister commence or carry on "any building or construction work; that is to say, the construction, alteration, repair, decoration, or demolition of any building."

It is now said that the existing state of the law prevents the performance of the covenant to repair, and that, consequently,

there is no actionable breach of contract. In the first place, there is no absolute prohibition against the necessary work. The work may be done under a licence from the Minister, and it is not pretended that there is or was any desire to do the work, or that a licence was sought for. Under the Act there is no defence unless the non-fulfilment of the contract is due to interference. There was no interference in this case. The truth and substance of the matter is that the financial position of the lessee's estate does not permit performance of the contract. I must, therefore, hold that the Defence of the Realm Act, and the regulations thereunder, supply no answer to the claim.

I now come to the claim of the Insurance Company. That is based on the right of subrogation, and the contention of the Company is that whatever sum is recovered by the insured must go to recoup the Company the amount paid on foot of the policy, irrespective of the consideration whether the insured has been fully indemnified against the loss sustained. This is met by the insured's contention that until he is fully indemnified he is not bound to contribute anything to the Company. I have no doubt that this latter view is correct. A contract of insurance against fire is only a contract of indemnity, and I think that the foundation of the doctrine of subrogation is to be found in the principle that no man should be paid twice over in compensation for the same loss. The corollary to this is that a contract of indemnity against loss should not have the effect of preventing the insured from being paid once in full. I do not think that this can be disputed. The law seems to be well settled, and is recognized in the leading text-books, and is fully borne out by the cases cited by Mr. Meredith: *Darrell* v. *Tibbitts* (1) and *Castellain* v. *Preston* (2).

Solicitor for Thomas Henry Marmion: *W. J. Verlin.*

Solicitor for the plaintiff: *J. Travers Wolfe.*

Solicitors for the Liverpool, London, and Globe Insurance Company: *J. L. Scallan & Co.*

A. H. W.

(1) 5 Q. B. D. 560. (2) 11 Q. B. D. 380.

M. R.
1917.
Dec. 6.
1918.
Jan. 30.

In re O'HARE.
MADDEN *v.* M'GIVERN.

Will—Absolute bequest—Gift over in the event of the legatee dying childless—Validity of gift over.

A testator bequeathed certain farms held as yearly tenancies to his son J. and his heirs, and in case of his son J. dying childless he directed that the farms should be given to his son P. Both J. and P. survived the testator, and both died without ever having had children, P. in 1882 and J. in 1917.

Held, that the gift over was valid, and that the personal representative of P. was entitled to the farms.

A gift over which is intended to have, or in fact has, the effect of preventing the exercise of a legal right attached to the estate devised is invalid.

Shaw v. *Ford*, 7 Ch. D. 669, considered and distinguished.

Summons.

Edward O'Hare by his will, dated the 20th November, 1879, bequeathed all his chattels, crops, cattle, and farming implements and also two farms of land, held by him as yearly tenancies, to his son John and his heirs, and in case of his son John dying childless he directed that these farms should be given to his son Patrick, on condition that there should be a valuation of the chattels and property to be equally divided amongst his sons and daughters. The testator died on the 9th December, 1879, and his will was proved by the plaintiff, the surviving executor, on the 5th August, 1917. Patrick O'Hare died on the 1st January, 1882, intestate, and letters of administration of his estate were granted to his sister, the defendant, Rose M'Givern, on the 15th September, 1917. After the testator's death his son, John O'Hare, entered into possession of the farms bequeathed to him, and continued in the possession and enjoyment thereof until his death on the 18th May, 1917. John O'Hare never had any children, and by his will, dated the 18th January, 1917, he made his wife, Mary Anne O'Hare, his universal devisee and legatee.

The summons was taken out by the executor of Edward O'Hare against Rose M'Givern as personal representative of

Patrick O'Hare, and Mary Anne O'Hare as universal legatee of John O'Hare, for the administration of the estate of Edward O'Hare, and for the purpose of having it determined who was entitled to the two farms in the events that had happened.

Cusack, for the plaintiff.

Redmond, for the defendant, Mary Anne O'Hare :—

The bequest to John O'Hare was an absolute gift, and the event on which the gift over took effect was one which could only be ascertained at the death of the devisee, i.e., at the moment when the gift over took effect; the gift over is therefore bad: *Shaw* v. *Ford* (1); *In re Parry and Daggs* (2); *M'Connell* v. *Beattie* (3); *Kirkpatrick* v. *King* (4). The rule is the same as regards gifts of personal property: *Holmes* v. *Godson* (5).

T. W. Brown, for the defendant, Rose M'Givern :—

In re Parry and Daggs (2) was decided on the ground that the effect of the gift over was to render the estate inalienable, and *M'Connell* v. *Beattie* (3) on the ground that the gift over was in restraint of marriage. If the dicta of Fry J. in *Shaw* v. *Ford* (1) are good law, every executory gift over, whether on failure of issue or any other event, must be invalid.

Cur. adv. vult.

1918. Jan. 30.

O'CONNOR M.R. :—

In this case, Edward O'Hare made his will, dated 20th November, 1879, whereby he bequeathed all his chattels, crops, cattle, and farming implements, and also certain farms of land, to his son John and his heirs, and, in case of his son John dying childless, he directed that the farms should be given to his son Patrick, on condition that there should be a valuation of the chattels and property to be equally divided amongst his sons and daughters. He then gave certain small pecuniary legacies to his children, including a legacy of £50 to his son Patrick, and appointed Robert Kelly and James Madden his executors.

(1) 7 Ch. D. 669, per Fry J., at p. 673.
(2) 31 Ch. D. 130.
(3) 38 I. L. T. R. 113.
(4) 32 I. L. T. R. 41.
(5) 8 D. M. & G. 152.

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The testator died on the 9th December, 1879, but his will was not proved until the 15th August, 1917, when probate of the will was granted to James Madden the surviving executor.

The testator's son John, to whom the farms were in the first instance bequeathed, went into possession thereof immediately after his father's death, and remained in possession till his own death on the 18th May, 1917. There is no evidence what became of the stock, crops, and implements on the farms.

John O'Hare made a will dated the 18th January, 1917, and he thereby made his wife, Mary Anne O'Hare, his universal devisee and legatee. Patrick O'Hare died on the 1st January, 1882, intestate, and letters of administration of his estate were granted his sister, Rose M'Givern. John O'Hare never had any children, so that he died childless, being the event on which the farms were to be given to Patrick.

The present proceeding is by summons to administer the estate of Edward O'Hare. His executor, James Madden, is the plaintiff, and the defendants are Rose M'Givern, the administratrix of Patrick O'Hare, and Mary Anne O'Hare, the executrix of John O'Hare. Rose M'Givern claims the farms under the gift over to Patrick O'Hare on the death of John O'Hare, he having died childless. Mary Anne O'Hare, as the personal representative of John O'Hare, claims that he was absolute owner. It was for the purpose of deciding upon these rival claims that the summons was taken out.

The question involved does not arise on the true meaning of dying childless. If it did, we would have to inquire whether it meant without ever having had a child, or whether it meant without surviving children. However, no matter what is the meaning of dying childless—whether it means never having had a child or that, having had children, none of them should survive the devisee—in the present case the event happened on which it was intended that the gift over should take effect.

It is clear that as a general proposition an estate given by will, though given absolutely in the first instance, may be defeated by a gift over on the happening of a particular event. A familiar instance is the case of the devise of an estate in fee to A. with a gift over in default of issue living at A's death to B. But it is

said that this rule is subject to exceptions, and that the present case is one of them. It is said that this is a case like that of *Shaw* v. *Ford* (1), in which it was held that the executory gift was bad because, in the language of Fry J. (p. 673), "any executory devise, defeating or abridging an estate in fee by altering the course of its devolution, which is to take effect at the moment of devolution and at no other time, is bad." It is difficult to understand this proposition if it is to be taken absolutely and in its most general meaning. Thus understood, it would strike at the root of all executory gifts over, because in a sense every executory gift over does alter the course of devolution of an estate. Were it not for the executory gift, the estate would devolve on the heir-at-law or devisee of the donee, but by reason of the gift over it goes in another way. But Fry J.'s proposition cannot be understood without reference to the circumstances of the case with which he was dealing. There the testator devised lands to his four sons as tenants in common in equal shares. Then he put a fetter on the right of each tenant in common to have a partition of the estate. Afterwards he directed that if there should be no lawful distribution, the lands should devolve to the children of his sons, and that if any of them died without issue his share should devolve to the survivors. Now that was the case of the gift of an estate which carried with it certain rights—the right to dispose of it according to law either by gift inter vivos or by will, and the right, if the owner so desired, not to dispose of it at all, and to allow it to devolve on his death according to law, viz., to his heir. A fetter or clog upon any such right is repugnant to the estate given, and is accordingly bad. It was for this reason that Fry J. held the gift over bad, and it was on this that his judgment was based. This is quite apparent, because he says (p. 673):—"It will be observed that the terms are 'if there should be no lawful distribution of this my property during the natural life of these my four sons,' and then it is given over in a certain way." Then he says later on:—"The contingency, in its nature, is the exercise of a right which attaches to every tenant in common of an undivided estate," by which he means that the alteration of the devolution of an estate on such a contingency

(1) 7 Ch. D. 669.

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is a deprivation of the right of property which ownership carries with it, and so is repugnant to the estate. Later on he says:—"Prima facie, and speaking generally, an estate given by will may be defeated on the happening of any event; but that general rule is subject to many and important exceptions. One of these exceptions may, in my opinion, be expressed in this manner, that any executory devise, defeating or abridging an estate in fee by altering the course of its devolution, which is to take effect at the moment of devolution, and at no other time, is bad. The reason alleged for that is the contradiction or contrariety between the principle of law which regulates the devolution of the estate and the executory devise which is to take effect only at the moment of devolution, and to alter its course."

That is a very different thing from saying that an estate given by will cannot be taken away and given over to another on a contingency. It means this, that an estate must be allowed to take the legal course of devolution, and that that course of devolution cannot be altered. Here is to be found the significance of the words—"the executory devise which is to take effect only at the moment of devolution and to alter its course." That this is the meaning of Fry J.'s general proposition is made certain by the authorities which he quotes. The first of these is *Gulliver* v. *Vaux* (1). This is a leading case, and the original report of it is contained in the MS. of Mr. Justice Burnett in Mr. Serjeant Hill's collection of MSS. in Lincoln's Inn Library, and is reproduced in the note to *Holmes* v. *Godson* (2). *Gulliver* v. *Vaux* (1) is shortly the case of a devise of real estate with a gift over in the event of the devisee dying without issue *and* without appointing the disposal of the estate. It was held that the gift over was void. The reasons are given in Burnett J.'s judgment, which is all the more valuable because when pronounced it was a dissenting judgment, but afterwards Willes C.J. and Abney J. changed their opinions and expressed concurrence. This is the language of Burnett J.:—"A condition or contingency repugnant to the estate devised must be void; thus a devise to one in fee upon condition that he shall not alien is void (Co. Litt. 223). So a devise in fee upon condition that the wife shall not be endowed

(1) 8 D. M. & G. 167*n*.

(2) 8 D. M. & G. 152.

or the husband be tenant by the curtesy is void because repugnant to the estate devised: *Mary Portington's Case* (1); *Sir Anthony Mildmay's Case* (2). So feoffment in fee upon condition that the feoffee's daughters shall not inherit, is void, because repugnant to the nature of the estate."

The next case referred to by Fry J. is *Holmes* v. *Godson* (3), in which there was a devise to the testator's son on his attaining twenty-one years; but in case he should die under twenty-one or having attained that age should not have made a will, then over. It was held that the gift over was void, because repugnant to the estate given. The judgment is summed up in these words of Turner L.J.: "This is in terms a disposition of real estate in favour of other devisees in the event of a devisee dying intestate, and I think that such a disposition is repugnant and void. The law, which is founded on principles of public policy for the benefit of all who are subject to its provisions, has said that in the event of an owner in fee dying intestate the estate shall go to his heirs, and this disposition tends directly to contravene the law and to defeat the policy on which it is founded. On principle, therefore, I think the disposition bad." The next case is *Barton* v. *Barton* (4), which decides that a gift over on the intestacy of the devisee is void as repugnant to the estate devised, because it alters the course of legal devolution. The reference to these cases shows very clearly what was pointed at by Fry J. as an executory devise defeating or abridging an estate in fee by altering the course of its devolution, which is to take effect at the moment of devolution. It is not an ordinary executory devise, but one which is to take effect on the doing or not doing by the devisee of something which his ownership entitles him to do or not to do. For instance, it is the privilege of the owner of a fee-simple estate to devise it or to allow it to descend to his heir. A condition which interferes with this privilege is repugnant to the estate and void. Fry J. points out this in the subsequent part of his judgment, and it is manifest that it is no authority for the proposition that a gift over on the death of a devisee dying childless is bad. That would strike at the root of all executory gifts over. As I said, there is a

(1) 10 Co. 38.
(2) 6 Co. 41*a*.
(3) 8 D. M. & G. 152.
(4) 3 K. & J. 512.

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difficulty in understanding Fry J.'s proposition about an executory devise altering the course of devolution at the moment of devolution. I think—and I say this with the utmost diffidence of such a master of legal exposition—that he rather obscured his judgment by starting, as a fundamental proposition, with a rule of law which is only contained in the larger proposition that any interference with the exercise of the rights attached to an estate is repugnant and void. Another case of executory gift over came before the same learned judge when a member of the Court of Appeal. This was *In re Parry and Daggs* (1). There a testator devised real estate to his son and his heirs, and then declared that in case his said son should die without leaving lawful issue, then and in such case the estate should go to his son's next heir-at-law, to whom he gave and devised the same accordingly. It was held by the Court of Appeal that the gift over was invalid, but only on the ground that its only effect was to prevent alienation of the estate by the devisee. The judgment of the Court was given by Fry L.J., and he says, at page 133:—"Then it was lastly argued that the gift over cannot take effect as an executory devise, because the only operation of it would be to give an estate in fee simple to the heir, who would have taken the same estate if there had been no gift; that, therefore, it is a gift which would not alter the devolution of the estate, but that its only effect would be to prevent the alienation of the estate, and that it is therefore invalid. From the earliest times the Courts have always leant against any device to render an estate inalienable. It is the policy of the law always to make estates alienable, and it is immaterial by what device it is attempted to prevent an owner from exercising the power of ownership. This lies at the foundation of the rule in *Shelley's Case* (2), in which words appearing to convey an independent gift were construed to be words of limitation. In the present case the testator's son is devisee in fee, and on his death either one of his issue will be his heir or someone else. If his heir be his issue, such issue will take under the original devise, and the gift over does not arise; if his heir be someone not his issue, such heir would take equally under the original devise and under the gift over, so that the operation of

(1) 31 Ch. Div. 130. (2) 1 Rep. 93*a*.

the gift over, if it be valid, is not to alter the devolution of the estate, but only to fetter the power of alienation during the lifetime of the son. That was an illegal device, and consequently the gift over is void."

M'Connell v. *Beattie* (1) was a case which came before my learned predecessor, Sir Andrew Porter. There the testator left to his son all his farm and money and everything he might die possessed of, "subject to the condition that he will not have it in his power to let, sell, or mortgage any part or portion of the property I am leaving him without having first of all secured the permission of my executors; and also subject to this other condition, that should my son, J. B. M'Connell, marry, and there be no living children born as a result, all my property, that is to say, land, money, and everything else he may inherit from me, will revert at his death to my brothers and sisters." It was the validity of the condition as to marriage that was in dispute. Sir. A. Porter's judgment was:—"The condition attached by the testator to the gift to his son is very extraordinary. If the son never married he would take, unfettered by the condition. If he married and had a child who died, the condition would be fulfilled. The only event which would take the property from him would be the event of marriage plus no living child. It is contended that the condition is void on two grounds—first, that the principle of *Shaw* v. *Ford* (2) applies, and that the event on which the gift over took effect was one which could only take effect at the death of the devisee. I hold that the principle established in that case applies to the present case. The conditions are both possible of accomplishment up to the moment of death, and the only event to close all possibilities is the death of the devisee. But another ground is relied on to which there is no answer. The condition is one in restraint of marriage. The policy of the law is to encourage marriage. For these reasons the condition is void, and J. B. M'Connell takes an absolute interest in the property." Now it is apparent from this judgment that Sir Andrew Porter's decision was based on the restraint of marriage. No doubt he thought that the condition came within *Shaw* v. *Ford* (2), but I do not think that as much attention was given to that case as otherwise

(1) 38 I. L. T. R. 113.

(2) 7 Ch. D. 669.

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might have been, as it was not necessary, having regard to the strong opinion held as to the other point. *Dugdale* v. *Dugdale* (1) was also relied on, but this was only another case of an attempt to restrain alienation which was held to be invalid.

All these cases only establish that a gift over which is intended to have, or in fact has, the effect of preventing the exercise of a legal right attached to the estate devised is invalid. Such an executory gift defeats the estate given on the exercise of a legal right attached to it, but leaves it untouched on a forbearance to exercise such right. That does not touch the ordinary executory devise on a contingency which has no connexion with the exercise or non-exercise of legal rights.

For these reasons I hold that the executory gift over in the present case to Patrick O'Hare was valid, and that as the contingency on which it was to take effect happened, his personal representative is now the owner. I understand that the summons, which in form is for the general administration of the estate of testator, was really taken out for the sole purpose of deciding the construction of the will. If that is so I think that it will suffice to make a declaration as to the validity of the gift over without any order for administration.

Solicitors for the plaintiff: *Wray & Donnelly.*

Solicitors for the defendant Rose M'Givern: *Hunter & Burland.*

Solicitors for the defendant Mary Anne O'Hare: *O'Hare & O'Hagan.*

A. H. W.

(1) 38 Ch. D. 176.

JOHN MOORE AND OTHERS, PLAINTIFFS, *v.* JOSEPH KELLY, CHRISTOPHER MOORE, AND OTHERS, DEFENDANTS (1).

Appeal. 1917. April 20, 23, 24. June 5.

Deed—Intention to defeat future Purchasers—10 *Chas.* 1, *sess.* 2, *c.* 3 (*Ir.*)—*Onus of proof—Voluntary Conveyances Act*, 1893 (56 & 57 *Vict. c.* 21)—*Valuable consideration.*

By indenture, made the 11th October, 1888, J. M. purported to convey to the defendants J. K. and C. M. part of the lands of F. upon trust to pay the income to the said J. M. for life, and after his death for C. M. absolutely. J. M. also granted to R. M., his wife, if she should survive him, a rentcharge of £40 per annum, and charged the lands with sums, amounting in all to £750, for each of his three daughters and his four sons, to be payable on the death of J. M. C. M. thereby covenanted with J. M., in the event of any of J. M.'s daughters getting married, to pay the sums therein mentioned, to be charged for her or their respective benefits, to be given credit for against her or their respective charges.

By a marriage settlement, made the 14th September, 1901, which recited the indenture of the 11th October, 1888, and stated, contrary to the fact, that all the charges on the lands of F. had been paid off, the said lands were conveyed by J. M. to C. M., and J. W., his intended wife. This deed recited the intention to make provision for the payment to J. M. of J. W.'s fortune of £300.

The defendants alleged that in October, 1888, J. M. was in embarrassed circumstances, and that the indenture of 1888 had been executed with the object of hindering and defeating a particular creditor, C., that the deed was never acted upon, and was never intended to be acted upon. J. M. died on the 25th March, 1909. This action was brought to raise the charges for J. M.'s sons and daughters.

Held, by the Court of Appeal (affirming the judgment of the Master of the Rolls), that there was no evidence from which the Court could infer any intention to defeat C. or any other creditor of J. M.; that the onus of showing that the deed of 1888 was executed mala fide lay on the defendants, and that the plaintiffs were not bound affirmatively to prove that the deed of 1888 had been executed bona fide.

Held also, assuming that the deed of 1888 was voluntary, that it was not open to the defendants to rely on the protection given to a creditor under the statute 10 Chas. 1, sess. 2, c. 3 (Ir.) (corresponding to 27 Eliz. c. 4), and that there was no evidence of intent to hinder or defeat any future purchasers.

(1) In the Court of Appeal, before SIR IGNATIUS J. O'BRIEN C., and RONAN and MOLONY L.JJ.

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The 10 Chas. 1, sess. 2, c. 3 (Ir.), remains in operation to prevent fraud of the character described in the statute; but a presumption of fraudulent intent has been got rid of by the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), which has cast the onus of showing that a deed has been executed mala fide on the person alleging it.

Held, per Ronan L.J., that the deed of the 11th October, 1888, was not voluntary, but executed for valuable consideration, namely, the covenant by C. M. to pay the sums on marriage to J. M.'s daughters.

APPEAL.

By indenture, dated the 11th October, 1888, John Moore, as beneficial owner, assigned certain lands in the Co. of Westmeath to the defendants, Joseph Kelly and Christopher Moore, to hold subject to and charged with various sums, amounting to £750, in favour of the plaintiffs, the younger children of John Moore, and an annuity of £40 for his wife, Rose Moore, upon trust to pay the income and annual profits to John Moore and his assigns during his life, and, after his death, for the said Christopher Moore, his eldest son, absolutely; and in the event of Christopher Moore predeceasing John Moore without leaving issue surviving at the decease of John Moore, an event which did not happen, it was provided that the lands should be held upon other trusts, now immaterial. By the said indenture Christopher Moore covenanted with John Moore that in the event of the said daughters of John Moore, or any of them, getting married during his lifetime, with his consent, Christopher Moore would pay to such daughter or daughters, upon her or their respective marriages, the sum or sums thereinbefore mentioned, to be charged for her or their respective benefits, to be given credit for against her or their said respective charges.

By an indenture, dated the 14th September, 1901, and made between the said John Moore, of the first part; Rose Moore, his wife, of the second part; the said Christopher Moore and Julia White, of the third part; the said Christopher Moore, of the fourth part; and the said Julia Moore, of the fifth part, being the settlement executed on the occasion of the marriage between Christopher Moore and Julia White, reciting the indenture of the 11th October, 1888, and that all the charges upon the lands comprised therein, save the said annuity, had been paid off (which

was not the fact), John Moore, in consideration of a promissory note for £300 made by the said Julia White and her brother, representing the wife's fortune, assigned the same lands to the said Christopher Moore and Julia White, their executors, administrators, and assigns. By this deed Rose Moore released the lands from her annuity of £40, and it was agreed that Christopher Moore should, subject to his own life interest therein, settle the lands on the said Julia White for her life, and that after the death of the survivor the lands should go to the children of the marriage as Christopher Moore and his wife should appoint, or in default of appointment equally. The lands were further charged with an annuity of £12 payable to the said John Moore and Rose Moore and the survivors of them, and they and the survivor of them were also given certain rights of residence and maintenance in the house on the lands.

The said John Moore died on the 25th March, 1909. The charges created by the indenture of the 11th October, 1888, were never paid to the plaintiffs, who were, however, maintained, educated, and advanced in life; and it was alleged by the defendants that one of the plaintiffs was paid £200, portion of the fortune of £300 belonging to Christopher's wife. The present action was brought by the plaintiffs to raise their respective charges, the defendants Joseph Kelly and Christopher Moore being sued as the trustees of the deed of the 11th October, 1888, and James Lavallin as representing the unborn issue of Christopher Moore and his wife.

The defendant Christopher Moore pleaded inter alia that "the said John Moore, deceased, was, at the time of the execution of the deed of the 11th October, 1888, in embarrassed circumstances, and in financial difficulties, and the said deed was drawn with the object of defeating and delaying his creditors, and was never intended to be acted upon, and never was acted upon, and was, with the consent of all parties interested thereunder, impliedly revoked."

The case is reported only on the question of the issue raised by this defence.

Evidence was given at the trial to the effect that at the date of the execution of the deed of the 11th October, 1888, John

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Moore was indebted to one Carson in a sum of over £1000, and had given a bond for the payment of the debt by instalments. It was also proved that this deed was not delivered to Joseph Kelly, the first-named trustee, but was kept in the house on the lands where John and Christopher Moore, the second trustee, resided. The parties to the second deed were aware of the execution of the first deed, the question of the charges created by the former having been discussed between them.

By his judgment, dated the 9th June, 1916, the Master of the Rolls declared the plaintiffs' charges well charged on the lands, and directed a sale of the lands in default of payment. Hence this appeal.

Henry K.C. and *Wylie K.C.* (*Begley* with them), for the appellants other than Lavallin :—

[They contended that in effect the charges created by the first deed had been paid off.] At the date of the first deed, which was a purely voluntary one, John Moore was in such financial difficulties that the inference is irresistible that the deed was intended to defeat and delay his creditors, and was therefore avoided by the second deed. It is immaterial that the defendants are not creditors; they are in the position of purchasers for valuable consideration, and can rely on the invalidity of the first deed. The Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), is, no doubt, retrospective, but this only saves voluntary conveyances "if in fact made bona fide and without any fraudulent intent." The "fraudulent intent" there referred to is not confined to an intent to defraud and deceive purchasers of lands within 27 Eliz. c. 4 (10 Chas. 1, sess. 2, c. 3, s. 1 (Ir.)), but extends to one to delay and defraud creditors within 13 Eliz. c. 5 (10 Chas. 1, sess. 2, c. 3, s. 2 (Ir.)). The onus of proving such fraudulent intent does not rest on the appellants, but the onus of proving that the deed was bona fide and without fraudulent intent rests on the respondents: *National Bank* v. *Behan* (1). This onus of proof has not been discharged.

(1) [1913] 1 I. R. 512.

Serjeant Matheson K.C. and *Leech K.C.* (*Joseph O'Connor* with them), for the respondents:—

The appellants admittedly were aware and had full notice of the execution of the first deed, which is recited in the second. The first deed was not avoided by the second; assuming John Moore to have been in financial difficulties, this was an honest family transaction, and was never within the mischief aimed at by the statute of Elizabeth. It was never impeached by the only creditor who is suggested to have existed. The appellants are not creditors of John Moore, and cannot impeach the deed as such under 13 Eliz. c. 5. Assuming Christopher and his wife to be purchasers for value, they can claim no relief under the 27 Eliz. c. 4. In any case we rely on the Voluntary Conveyances Act, 1893. The words "fraudulent intent" in that statute refer to a fraudulent intent against purchasers, not against creditors, and no such fraudulent intent can be suggested here. It is not for the respondents to disprove the existence of such fraudulent intent. They cannot prove a negative. If the appellants allege the deed not to have been bona fide, and that it was executed with a fraudulent intent, the ordinary rule of law must apply, that he who alleges fraud must prove it. *National Bank* v. *Behan* (1) was wrongly decided, and we ask this Court to reverse the decision there given.

Condon, for Lavallin.

[The following cases were cited and discussed:—*National Bank* v. *Behan* (1); *Lloyd* v. *Attwood* (2); *Phipps* v. *Ennismore* (3); *Cracknall* v. *Janson* (4); *Exton* v. *Scott* (5); *In re Holland* (6); *Gooch's Case* (7); *Clarke* v. *Wright* (8); *Doe d. Newman* v. *Rusham* (9); *Townend* v. *Toker* (10).]

(1) [1913] 1 I. R. 512.
(2) 3 De G. & J. 614.
(3) 4 Russ. 131.
(4) L. R. 11 Ch. D. 1.
(5) 6 Sim. 31.
(6) [1902] 2 Ch. 360.
(7) 3 Coke, 121.
(8) 6 H. & N. 849.
(9) 17 Q. B. 723.
(10) L. R. 1 Ch. App. 446.

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SIR IGNATIUS J. O'BRIEN C.:—

By indenture, made on the 11th October, 1888, between John Moore, of the first part; Joseph Kelly and Christopher Moore, of the second part; and Christopher Moore, of the third part, Christopher Moore purported to convey to Joseph Kelly and Christopher Moore part of the lands of Finnea, to hold to them upon trust to pay the income to John Moore and his assigns during his life, and after his death for Christopher Moore absolutely; but, in the event of Christopher pre-deceasing John Moore without leaving issue him surviving at the decease of John Moore, it was provided that the lands should be held upon a series of trusts which it is not necessary to consider, as the events provided for did not happen. It was also provided that John Moore should grant to Rose Moore, his wife, if she survived him, a rent-charge of £40 per annum; and the lands were charged by him with the payment of the following sums of money:—£150 for his daughter Mary, £100 each for his daughters Kate and Anne, and £100 for each of his sons Peter, Thomas, John, Luke, and Owen—in all £750, to be payable on the death of John Moore. There was a provision for the maintenance, education, and advancement of his sons and daughters under the age of twenty-one, with power to pay to the daughters, on marriage, their portions.

Christopher Moore was married in September, 1901, to Julia White. She had a fortune of £300, and a settlement was made on the 14th September between John Moore, father, Rose Moore, his wife, Christopher Moore, son, and Julia White, the intended wife. It recited the indenture of the 11th October, 1888, and after the following recital:—"Whereas all the charges on the said lands of Finnea have been paid off and satisfied by the said John Moore," it was witnessed that in consideration of the marriage and of the sum of £300 to be secured to the said John Moore by the promissory note of Julia White and her brother, the lands were conveyed by John Moore to Christopher Moore and Julia White upon limitations which in effect conferred life estates upon them and the survivor of them with remainder to their children as appointed.

The recital that the charges created by the earlier deed had been paid off was not true in fact. Mary, a daughter of John Moore, appears to have been paid a portion of the fortune of Julia White; but the other members of the family had not in fact received their portions; it may, however, have been thought that, although not paid, they had been, in fairness, settled with. Now, however, the father having died, the plaintiffs have brought the present action for a declaration that the sum of £750 provided by the settlement of 1888—in so far, of course, as any claims may not have been paid or discharged—may be raised out of the lands.

One cannot help having very great sympathy with the defendant Christopher Moore; and, certainly, it is very hard that the fortune of his wife should have been parted with, and that the provision which was intended to be made for her may, to a great extent, if not altogether, fail. But one cannot decide a case having regard merely to sympathy. If, therefore, the claims of some of these children are good in law, and if the voluntary settlement made by their father must be regarded as an honest dealing with the property, they also have got rights which in justice ought not to be disturbed. It is to be regretted that the honest efforts which were made to effect an adjustment of the rights of all the parties, irrespective of strictly legal considerations, did not succeed. This cannot affect the decision.

The defence in substance is this: It is not admitted that the deed of 1888 was a voluntary settlement; but it is contended that the deed of the 14th September, 1901, placed the defendants in the position of purchasers for value, so that if the first deed was voluntary (and as everything had taken place prior to the statute 56 & 57 Vict. c. 21), the first deed should be treated as fraudulent and void as against those claiming under the second deed. I assume in my judgment that the first deed was voluntary. I have so clear an opinion of the legal question involved that I prefer to treat the case on that footing although it may be otherwise in fact. The Voluntary Conveyances Act, 1893, has, however, made a vital alteration in the law; and the contention on behalf of the respondents is that it operates as a complete answer to the defence.

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Several questions of law have been argued before us on behalf of the appellants, the defendants in the action; and one question of pure fact has also been discussed. It was urged by the appellants that at the date of the execution of the deed of 1888, John Moore, the settlor, was indebted in a large sum of money to a man named Carson; that he was in embarrassed circumstances and financial difficulties; and that the deed was executed with the object of hindering and defeating this particular creditor, along with other creditors; that it was never intended to be acted upon, and was never acted upon; and that this arrangement was made with the consent of all the parties, and to aid in the carrying out of the fraudulent object in view.

Assuming the true view of the facts to be as suggested, and that the object of the deed was to hinder and defeat the creditors of John Moore, it was then argued as a matter of law that the deed was avoided by the second deed, even though none of the parties could be regarded as a creditor of John Moore; that, in order to bring the deed within the statute of 1893, it was necessary for the plaintiffs to negative the existence of any mala fides; and that if the object of the deed was to hinder, defeat, and delay creditors, a fraudulent intent was established, which would make it void in favour of a subsequent purchaser, even though there was no attempt to commit a fraud on a purchaser, as distinguished from a creditor, and although no creditor had elected to treat the deed as fraudulent as against him.

The Master of the Rolls held, as a fact, that there was no evidence from which he could infer any intention to defeat Carson or any other creditors, and I agree with him in that view. This, of course, is a complete answer to the appellants' case in so far as it is based on the argument that an intent to defeat creditors under the 13 Eliz. will enable a deed to be avoided as against a purchaser under the 27 Eliz. I do not, however, assent to the legal contention put forward, which I will deal with later on. There remains the other view, namely, that under the Act of 1893, the plaintiffs were bound, affirmatively, to prove that the deed as executed by John Moore, had been executed bona fide. I may say at once that I do not see any evidence from which to infer that this deed was not intended to be an operative

instrument, or that there was in fact, and as distinguished from legal presumption, any intent to hinder or defeat any future purchasers.

It is true that the deed was not delivered to one of the trustees, and it certainly appears to have remained in the house of the settlor; but when inquiries were made with regard to it, on the occasion of the marriage of Christopher Moore, it was treated as being a deed fully in operation, and the only question raised was whether the terms of it had been satisfied. Indeed the defendants are precluded, I think, from contending that the deed was a mere pocket instrument, inasmuch as it is treated in the deed under which they themselves take as having been a perfectly good instrument, although by an unhappy but innocent representation an error was made as to the beneficiaries under the first deed, in fact, having been satisfied. As for the contention which appears on the pleadings, that the beneficiaries had abandoned all claim under the deed, the evidence is all the other way. A case is sought to be made against one member of the family on the ground that she wrote letters which brought home to her mind the inaccuracy of the statement contained in the deed, but she was very young; moreover, she acted only as an amanuensis, and, in the circumstances, I can see no reason for binding her to any waiver of the trusts in her favour.

I do not think it is necessary to go into the details of the evidence which satisfies me as to the correctness of the inference which the Master of the Rolls has drawn, and which I also draw. I propose now to deal with the questions of law which were raised, and which I have already indicated. It was decided by the Master of the Rolls in *National Bank* v. *Behan* (1) that on the true construction of the Voluntary Conveyances Act, 1893, the onus of proving that a voluntary deed was made bona fide and without fraudulent intent lay upon the party seeking the protection of the Act. I need hardly say that the opinion and judgment of so experienced a lawyer as the Master of the Rolls would never be overruled by me unless I considered that I was absolutely bound to come to a different conclusion. The fact that a similar view of the law is stated in May on Fraudulent and Voluntary

(1) [1913] 1 I. R. 512.

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Conveyances (1) does not, of course, add any authoritative weight to the judgment of the Master of the Rolls; but it is, at the same time, a statement which I should not be disposed to treat in any other way than with respect.

Let us consider what was the position of affairs with regard to voluntary deeds under 27 Eliz. c. 4, apart from the Act of 1893. The purpose of that Act was to protect purchasers of lands against gifts and conveyances "meant and intended by the parties that so make the same to be fraudulent and covenous of purpose and intent to deceive such as have purchased or shall purchase the same"; and then for remedy it was enacted that every such conveyance had or made or to be had or made "for the intent and of purpose to defraud and deceive" such persons as had purchased or should purchase, should, as against such purchasers, be deemed to be utterly void. What, to many lawyers appeared to be a singular and unreasonable construction was put on an Act which, on the face of it, might be regarded as fairly clear. Although voluntary conveyances were not mentioned in the Act, it was ultimately determined judicially that the mere fact that a conveyance was voluntary and without consideration made it ipso facto void as against anyone who might afterwards become a purchaser of the lands dealt with by the voluntary conveyance. A fraudulent intent was presumed by the courts; and this presumption was conclusive and irrebuttable, so that, however honest, reasonable, fair, or just a voluntary conveyance was, it became mere waste paper on the production of a conveyance for value to a subsequent purchaser. A statute which was framed to prevent injustice was so read as to do grave and serious injustice. Against this construction of the statute the feeling both of the profession and the public became in the end so strong that in 1893 the statute at present under consideration was passed.

The Act 27 Eliz. c. 4, of course, is not repealed, and it remains in operation to prevent fraud of the character described in the statute; but a presumption of fraudulent intent, wholly the outcome of judicial decision, has been got rid of by the Act of 1893. By sect. 2 of the Voluntary Conveyances Act, 1893, the rule of law, which defeated, irrespective of fairness, a voluntary

(1) 3rd ed., pp. 161 and 324-5.

conveyance, was abrogated, and the statute 27 Eliz. c. 4 was allowed to speak for itself and to avoid deeds, the real object of which was proved to be to defeat a future purchaser; but the onus of proving fraud is always on the person alleging it, though in many cases its existence may be an almost certain inference. And it seems to me that it would defeat the very object of sect. 2 of the Act of 1893, which was intended to destroy the former rule of law, to hold that it was only intended to modify it to the extent that a party, supporting an honest deed, might be at liberty to show as a substantive case that the deed was made bona fide. How such an onus could be discharged it is difficult to see. It seems to me that practically it could only take the form of swearing to a negative—a perfectly futile proceeding. The words "if in fact made bona fide and without any fraudulent intent" appear to me to have been inserted lest the latter part of the section might be construed to have gone too far, and to have amounted to a repeal of 27 Eliz. c. 4, or of 10 Chas. 1, s. 2, c. 3 (Ir.), dealing with this question. I think it could never have been intended that there was to be read into the statute of 27 Eliz. c. 4 what in substance would be this: "voluntary conveyances shall be deemed to be fraudulent unless the contrary is proved." The intention was, I think, to get rid of an inequitable rule with regard to voluntary conveyances, leaving them to be destroyed by evidence of fraudulent intent; and, ordinarily, I should have thought that the person on whom the onus of proof would lie under 27 Eliz. c. 4, once the irrebuttable presumption to which I have referred was swept away, was the person alleging fraud, just as under 13 Eliz. c. 5, where an actual intent to defraud the grantor's creditors is alleged, the burden of proving such intent falls on the person alleging it. The two classes of deeds appear to me to be placed on the same footing in this respect; and the Act of 1893 might, in many cases, wholly fail to get rid of the evil it was intended to remove if it was held to have set up a new rule quite as artificial, if not more artificial, than that which it was designed to destroy.

The same method of reasoning induces me, without hesitation, to decide against the appellants' contention with regard to the second question argued by them, namely, that "without any

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fraudulent intent" did not mean a fraudulent intent to defeat purchasers. The expression "if in fact made bona fide and without any fraudulent intent" must, to my mind, be read as referring to 27 Eliz. c. 4. Of course, there may have been cases where a voluntary deed could have been avoided under 13 Eliz. c. 5 as well as under 27 Eliz. c. 4, where it was found simpler to apply the irrebuttable legal presumption which got rid of it under 27 Eliz. c. 4. But if the latter Act and that of 1893 are read together, as they must be, I cannot read into 27 Eliz. words which would extend the operation of that statute in a direction, to my mind, never contemplated. Gifts intended to defeat purchasers are the transactions that are avoided. The fraudulent intent in 27 Eliz. is a fraudulent intent to defeat purchasers. Why should I read fraudulent intent in the Act of 1893 in a different sense from what it bears in the statute 27 Eliz. c. 4?

If sect. 2 of the Act of 1893 was to be taken as a perfectly independent enactment affirmatively avoiding all voluntary conveyance unless any kind of fraudulent intent was negatived, then the contention of the appellants on both grounds might be right; but once I treat it as a statute to get rid of certain effects of judge-made law, and to be read with the Act of 27 Eliz. c. 4, and not as an independent enactment, the construction put upon it by the appellants, to my mind, is not sustainable.

RONAN L.J.:—

1. A man with an estate of £50,000 a year charges it with an annuity of £100 for the life of one of his sons. Twenty years after he sells the estate to *X*. 2. A man grants a piece of land to his son. The next day he sells it to *X*. In both cases the first deed is a voluntary deed. In case 1 it was clearly bona fide, and not made with any fraudulent intent. In case 2 it was plainly made with intent to defraud the purchaser. Judicial construction of the Act made the first deed in both cases equally fraudulent and void as against *X*.

In *Doe d., Otley* v. *Manning* (1), a case where there was no fraud in fact, Lord Ellenborough said the question was "whether in such case the law do not presume fraud without

(1) 9 East, 59.

admitting such presumption to be contradicted" (p. 63). That case finally settled the law, and it was held that there was a conclusive presumption that every voluntary deed which had the effect of depriving a subsequent purchaser from the grantor of what the purchase deed purported to give him was made with intent to defraud the purchaser within the Act. This principle plainly treated as fraudulent perfectly honest transactions, and was found, particularly in the case of settlements making provision for families, to operate very harshly and unjustly. However, once the deed was a voluntary deed the law was inexorable. In order to mitigate this evil the Courts adopted the view that a very slight consideration should be taken as sufficient to prevent the deed being a voluntary deed.

I shall now refer to some of the cases on the subject. It will be seen that the result of the cases is that if there is an honest family transaction a slight legal consideration is sufficient to take the case out of the category of voluntary deeds, and the honesty of the transaction rebuts any presumption of fraud. (See judgment of Palles C.B. in *Mullins* v. *Guilfoyle* (1).)

In *Townend* v. *Toker* (2) the plaintiff claimed specific performance of an agreement for the sale to him of an estate which at the date of the agreement was the subject of a settlement alleged by the plaintiff to have been voluntary, and void as against him. The vendor and settlor, who was entitled in fee to the estate subject to mortgages, proposed to her nephew that she should come and live with him, and that he should remove into a larger house for the purpose, she contributing a yearly sum towards the housekeeping. The nephew agreed to this, provided she would settle the estate limiting it to him after her death. She agreed to this, and a settlement was accordingly executed, by which the nephew covenanted to indemnify her from all liability in respect of the mortgages, except the payment of the interest during her life. He removed to a larger house at considerable expense, and they lived together for some time. The aunt afterwards ceased to live with the nephew, and subsequently agreed to sell the estate to the plaintiff. Lord Romilly, Master of the Rolls, made a decree declaring the plaintiff entitled to specific

(1) 2 L. R. Ir., at p. 109.

(2) L. R. 1 Ch. App. 446.

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performance, but this decree was reversed by Turner and Knight Bruce L.JJ., who held not only that there was sufficient consideration upon the face of the deed itself, namely, the covenant of indemnity, to take the case out of the operation of the statute, but also that evidence was admissible to show consideration for the deed not appearing on the face of it, and that there was sufficient evidence of such consideration, namely, the expenses incurred by the settlor's nephew upon the faith of the settlement being executed. "The question," Lord Justice Turner said, at p. 158, "as I apprehend, in cases of this description is whether there was consideration for the settlement. The Court not entering into the quantum of consideration, in effect the question is, whether the transaction was one of bargain or of gift merely."

In *Bayspoole* v. *Collins* (1) the bill was filed by a puisne incumbrancer, who sought a declaration that a certain post-nuptial settlement was a voluntary settlement of the premises comprised therein, and was accordingly superseded by the plaintiff's mortgage, executed subsequent thereto, so far as was required to give the plaintiff the full benefit of his security. The execution of the settlement was induced by the promise of an advance of £150, secured by promissory note, to pay the interest due on an existing mortgage. Lord Hatherley C. there said (at p. 232): —"I do not think anything could be more unsatisfactory than what we find to be the state of the law under which a person, with full and distinct knowledge of a voluntary settlement, is able at any time to overthrow it. It is quite established that, although a settlor cannot get rid of such a settlement directly, he can do so indirectly by making a mortgage of the property to somebody else for the purpose of being able to destroy the settlement." And he continues: —"It is not for me to say whether the mode by which the Court has attempted to remedy some of the evils of this state of the law, namely, by holding that a small and inadequate consideration is sufficient to support such a settlement under the statute of Elizabeth, has diminished the extent of the mischief. But so it is, that a very small consideration is admitted to be sufficient." And Lord Hatherley accordingly held that the

(1) L. R. 6 Ch. App. 228.

advance of the £150 was sufficient consideration to support the settlement. In *Rosher* v. *Williams* (1) the decision was the other way, the Court there holding that the particular covenant which was relied upon as raising a consideration was valueless; but Malins V.-C. fully recognizes what he describes as the qualification of the old rule of the Court. He says (at p. 218):—"I quite agree that *Townend* v. *Toker* (2) is a very material authority; and I think the fair result of them all [the modern decisions] may be thus stated: that if upon the occasion of executing that which is called a voluntary settlement, that is, a deed which is not induced by marriage or any marriage considerations, or the actual sale of property; if between a father and son, husband and wife, or parent and child, in any way whatever, an instrument is executed which ordinarily is called a voluntary settlement, and it turns out that, instead of being purely voluntary, any consideration whatever was paid or given, or any benefit rendered to the grantor, even such as an agreement to relieve the grantor from the immediate payment of a debt, as in *Bayspoole* v. *Collins* (3), the Court will anxiously lay hold of any circumstances constituting a consideration moving from the grantee to the grantor, to take a case out of the category of voluntary settlements." In *Mullins* v. *Guilfoyle* (4) Palles C.B. (at p. 108) points out that the decision in *Rosher* v. *Williams* (1) only amounted to this, "that a nominal consideration is insufficient to support a deed under" the 27th Eliz.

On these authorities, having regard to the general character of the deed, I am of opinion that the covenant by Christopher to pay the sums charged in favour of the daughters is sufficient consideration to take this deed out of the class of voluntary deeds.

The question whether or not there was actual fraud is a question of fact, to be determined from a consideration of the circumstances in which the deed was executed. "That question"—whether the impeached deed was or was not void under the statute of Elizabeth—"depends upon the bona fides of the transaction, to be judged of on all the circumstances of the case. It

(1) L. R. 20 Eq. 210.
(2) L. R. 1 Ch. App. 446.
(3) L. R. 6 Ch. App. 228.
(4) 2 L. R. Ir. 95.

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is a question to be decided by us as a jury would decide it:" per Turner L.J. in *Lloyd* v. *Attwood; Attwood* v. *Lloyd* (1).

In this case I am of opinion that there was no fraud. In *Mullins* v. *Guilfoyle* (2), at p. 109, Palles C.B. says: "I can understand cases in which the relation of the parties as husband and wife or parent and child, or the nature of the transaction such, for instance, as a family arrangement, will be sufficient to uphold a transaction based upon a consideration which, although valuable, is so inadequate that it might, under other circumstances, have raised an inference of fraud." I think this is a case to which this statement applies. This would dispose of the case, even if the Act of 1893 had never been passed.

Even if the deed were a voluntary deed, I am of opinion that it was "in fact made bona fide and without any fraudulent intent" within the meaning of the Act of 1893, and that therefore it should not "be deemed fraudulent or covinous within the meaning of the 27 Eliz. by reason of any subsequent purchase for value." The purchaser's remedy is either under that Act or at common law. A purchaser has no right to set aside a previous conveyance by the vendor on the ground that it was made with intent to defeat the vendor's creditors. He is not a creditor; he only claims through the vendor, and the previous conveyance is good against the vendor. I do not think that the result of the Act of 1893 is to give a subsequent purchaser a right to set aside a deed under the provisions of the 13th Eliz. c. 5. A deed can only be set aside under that Act so far as it defeats the creditors and for their benefit. Save to that extent the deed is good, and the grantee retains the property, save so far as is necessary to give effect to the claim of the grantor's creditors.

A subsequent purchaser gets no benefit where a deed is declared void as against creditors. The purchaser's remedy must, therefore, be at common law or under the statute of 27 Eliz. Mr. Henry really contends that the effect of the legislation is that a subsequent purchaser can set aside a voluntary deed on the ground that it was made with the intent to defeat creditors, and that the deed is set aside, not only so far as it defeats or delays creditors, but for all purposes. The Act of 1893 never

(1) 3 De G. & J. 614, at p. 654. (2) 2 L. R. Ir. 95.

intended such a fantastic result as to give a purchaser the right to set aside a deed as a fraud on creditors, and at the same time to allow him to retain the property and give the creditors nothing.

Lastly, even assuming that a deed made with intent to defeat creditors would not be within the protection of the Act of 1893, I am of opinion that the Carson matter does not bring this deed within the 13th of Eliz. c. 5. In my opinion the deed in this case was "in fact made bona fide and without any fraudulent intent" to defeat either purchasers or creditors. Even if it was within that Act as judicially interpreted it would be "in fact made without any fraudulent intent" within the meaning of the Act of 1893, and therefore within the protection of the latter Act.

MOLONY L.J.:—

This action was brought by the plaintiffs to raise a sum of £750, which, by an indenture of settlement, dated the 11th day of October, 1888, and made between John Moore of the first part, Joseph Kelly and Christopher Moore of the second part, and the said Christopher Moore of the third part, was charged upon certain lands known as Finnea in the Co. Westmeath. The original defendants, Joseph Kelly and Christopher Moore, were sued as trustees of the said indenture of settlement, and subsequently Julia Moore and Rose Moore were joined as defendants, because they claimed to be interested in the lands under an indenture of settlement, dated the 14th day of September, 1901; and James Lavallin was also joined as a defendant, to represent the unborn issue (if any) of the said Christopher Moore and Julia Moore.

By the said indenture of the 11th October, 1888, the said John Moore charged the premises with the sum of £150 for his eldest daughter, and with the sum of £100 for each of six other children, said sums amounting in all to £750. There is some evidence that at the time of the execution of this deed John Moore was indebted to a man named Carson in a considerable sum, and it was suggested that the deed was simply intended as a cover against Carson's debt. On the other hand, Rose Moore, the widow of John Moore, states that it was she who told him to get the deed, or to make a will, as he was delicate, and that he then brought the deed in question back from Dublin, and same was subsequently

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registered. I am not satisfied on the evidence that the deed in question was made for the purpose of preventing Carson from recovering his debt, and there is no evidence of any other debt. Carson, although he took a bond for payment of his debt by instalments several years later, never impeached the deed, and even if the deed could have been set aside as against him, it is not open to the defendants to rely on the protection given to a creditor the statute 10 Chas. 1, Sess. 2, c. 3.

Christopher Moore, in 1902, married Julia White, who had a fortune of £300, and on the occasion of the marriage a settlement was executed, dated 14th September, 1901, under which John Moore assigned the lands to Christopher Moore and Julia White, subject (inter alia) to the payment of an annuity of £12 to the said John Moore and Rose Moore, and to certain covenants in reference to their support. At the time of the execution of the settlement all the children of John Moore—ten in number—were of age. They had been well educated, and had either entered the Church or been otherwise provided for, and, with the exception of Mary Moore and Anne Moore, had ceased to live on the lands. The plaintiffs in the present action seek to have their charges raised, and the defendants, Christopher Moore and Julia Moore, have both defended, and in particular Julia Moore has pleaded that she is a purchaser for value of the lands comprised in the settlement of the 14th September, 1901, without notice of any of the alleged charges, and that consequently she is entitled to priority over them. She contended that the deed of 11th October, 1888, is fraudulent within the meaning of 27 Eliz. c. 4 (10 Chas. 1, Sess. 2, c. 3, Ireland). It appears clear from the correspondence, however, and from the recitals in the deed of 1901 that all the parties to the settlement were aware of the prior voluntary deed, and that they also believed that no claim would be made under it, as the children had received an equivalent to its benefits in the amounts which had been expended on their maintenance, education, and settlement in life.

The object of the statute of Elizabeth was to make fraudulent conveyances void as against subsequent purchasers, and by a series of judicial decisions voluntary conveyances were deemed fraudulent within the meaning of the statute. As was laid down in *Doe d.*,

Newman v. *Rusham* (1): "The principle on which voluntary conveyances have been held uniformly to be fraudulent and void as against subsequent purchasers appears to be, that, by selling the property for a valuable consideration, the seller so entirely repudiates the former voluntary conveyance, and shows his intention to sell, as that it shall be taken conclusively, against him and the person to whom he conveyed, that such intention existed when he made the conveyance, and that it was made in order to defeat the purchaser. Such deeds have been held fraudulent and void as against such purchasers, even when they have had notice of them: *Doe d., Otley* v. *Manning*" (2).

Under this Act when it was once shown that the conveyance was voluntary nothing further was necessary; but a change was made by the Voluntary Conveyances Act, 1893, which enacts (sect. 2) as follows:—"No voluntary conveyance of any lands, tenements, or hereditaments, whether made before or after the passing of this Act, if in fact made bona fide and without any fraudulent intent, shall hereafter be deemed fraudulent or covinous within the meaning of the Act 27 Eliz. c. 4, by reason of any subsequent purchase for value, or be defeated under any of the provisions of the said Act by a conveyance made upon any such purchase, any rule of law notwithstanding."

In the *National Bank* v. *Behan* (3) the Master of the Rolls held that the onus of proving that a voluntary conveyance was made bona fide and without fraudulent intent, so as to bring it within the protection of sect. 2 of the Voluntary Conveyances Act, 1893, lies on the party seeking to uphold such voluntary conveyance. This only means, however, that a person seeking to uphold a voluntary conveyance must give some evidence from which a court could prima facie infer that the transaction was bona fide. Assuming in favour of the defendants without formally deciding that the onus is as stated by the Master of the Rolls, I think the evidence given by Rose Moore and the nature of the transaction itself was sufficient to discharge that onus and entitled the Master of the Rolls to find in favour of the plaintiffs.

Solicitor for the appellants: *Louis C. P. Smith.*
Solicitors for respondents: *Matheson & Prentice.*

R. ST. J. C.

(1) 17 Q. B. 723, 724. (2) 9 East, 59. (3) [1913] 1 I. R. 512.

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1918.
Jan. 21, 22.

In re MARY GEOGHEGAN (1).
(Folio 6098. Co. Limerick.)

Land Registry—Registered land—Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66), sects 35, 38—Subdivision without consent of Land Commission—Registration of title of subdivided portion.

The owner of land registered under the Local Registration of Title (Ireland) Act, 1891, subject to a purchase annuity, assigned portion thereof to a transferee without the consent of the Land Commission.

Held, reversing the decision of Ross J., [1917] 1 I. R. 361, that the transferee was entitled to have his title to the land so transferred registered under the Act, but that such registration would not affect the overriding power of sale conferred upon the Land Commission in such case.

Mary Geoghegan, the registered owner of lands subject to a land purchase annuity, assigned part of her holding on the 25th May, 1916, to her son Daniel, who applied to the Land Commission for their assent to the subdivision, which was withheld. Daniel Geoghegan having applied to the Registrar of Titles to have his title to the subdivided portion of the holding registered under the Act of 1891, the Registrar granted his application (2). From this decision the Land Commission appealed to Ross J., who reversed the decision of the Registrar, holding that the applicant was not entitled to have his title registered (3). Hence the present appeal.

Jellett K.C. and *Comyn K.C.*, for the appellant:—

We submit that the decision of the registering authority was correct, and should be restored. In order to arrive at the true construction of sect. 54 of the Irish Land Act, 1903, it is necessary to consider the earlier sections of the Land Code dealing with alienation and sub-division. Sect. 10 of the Landlord and Tenant Act (Ireland), 1860, absolutely prohibits any assignment of lands or any part thereof comprised in an agreement which restrains or prohibits such assignment unless the consent of the landlord be obtained as prescribed. Sect. 18 of the same Act contained a

(1) In the Court of Appeal before Sir Ignatius J. O'Brien C. and Ronan and Molony L.JJ.

(2) The decision of Mr. Manders will be found reported in 51 I.L.T.R. 98.

(3) [1917] 1 I. R. 361.

similar absolute prohibition of subletting contrary to agreement. In each of these sections the words used are—"It shall not be lawful," &c. In section 44 of the Landlord and Tenant (Ireland) Act, 1870, the prohibition is expressed in slightly altered language, but remains absolute:—"No purchaser . . . of any holding to whom any advance has been made under this section shall, without the consent of the Board, alienate, assign, subdivide, or sublet his holding" while the annuity remains unpaid; and the penalty for contravention of this provision was forfeiture to the Commissioners of Public Works in Ireland of the part alienated, &c. Sect. 45 contains similar provisions. This penalty of forfeiture was modified by sect. 2 of the Landlord and Tenant (Ireland) Amendment Act, 1872, which empowered in lieu of forfeiture a sale of the holding or any part thereof. Sect. 2 of the Land Law (Ireland) Act of 1881 prohibited subdivision and subletting without the consent of the landlord in the case of tenancies from year to year to which the Act applies, the words being, "the tenant . . . shall not . . . subdivide," &c. These words were held in *Fogarty* v. *Shanahan* (1) to have the same invalidating effect as the words in the earlier section, "it shall not be lawful." The harsh and unjust results of the decisions on the earlier sections, such as *Donoughmore* v. *Forrest* (2) and *Gillman* v. *Murphy* (3), had been universally recognized; and when we come to sect. 30 of the Act of 1881, containing the conditions annexed to holdings subject to advances, we find a striking change in the language used. There the prohibition of the subdivision or subletting of a holding, for the purchase of which money has been advanced by the Land Commission, is not only confined to the period during which the holding remains subject to any charge in respect of the annuity, but is expressly limited by the introductory words "as between the Land Commission and the proprietor for the time being," &c. The judgment of Ross J. in the present case gives no effect whatsoever to these words, which are re-introduced in sect. 54 of the Act of 1903 and sect. 32 of the Act of 1909, and overlooks the "distinct qualification" pointed out by Holmes L.J. in *Farrelly* v. *Donnelly* (4), where the learned Lord Justice said that

(1) [1896] 2 I. R. 273.
(2) I. R. 5 C. L. 443.
(3) I. R. 6 C. L. 34.
(4) [1913] 1 I. R. 50, at p. 60.

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the only meaning he could attach to these words was that the subdivision was forbidden only "in so far as it would affect in any way the Land Commission or the annuity payable thereto." It is submitted that the change in the language containing the prohibition was introduced for two reasons—first, to obviate the unjust results which might follow from the later sections being judicially interpreted as strictly as the earlier analogous sections; and, secondly, because the Legislature was in these later sections dealing not with the case of landlord and tenant, but with the fee-simple estates acquired by the purchasing tenants; and it was felt that an absolute prohibition of alienation would be repugnant to the nature of such an estate.

If, as Ross J. appears to have considered, the question rests on public policy, the section would have been definitely framed so as to absolutely prohibit alienation, &c.; it would not have been limited by the introductory words, and the limited prohibition would not have ceased on the cesser of the annuity. The Land Commission are not affected in any way by our contention. Their over-riding power of sale remains unaffected; but if they do not elect to exercise it—and they must exercise it, if at all, within a reasonable time—the alienation or subdivision remains valid inter partes. The registration of the title of the assignee cannot affect this power.

Sect. 38 of the Local Registration of Title (Ireland) Act, 1891, merely preserves the effect, whatever it may be, of the prohibitory sections of the Land Code; it does not add to them in any way. If, however, we are right in our contention that the alienation in the present case was valid inter partes, non-registration under this Act will not destroy the appellants' title, as under sect. 25, sub-s. 1, and sect. 35, sub-s. 2, no title would be acquired by the transferee until the registration of the transfer, and this in the face of sect. 35, sub-s. 1, which expressly empowers a registered owner to "transfer the land or any part thereof"; and it enacts that "the transferee shall be registered as owner of the land transferred." It is impossible to reconcile the decision of Ross J. with these provisions. [They also referred to *In re Pennefather's Estate* (1) and *Hughes* v. *Higgins* (2).]

(1) I. R. 6 Eq. 260.

(2) 29 I. L. T. R. 82.

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Wylie K.C. and *Babington*, for the Land Commission:—

The real question for decision is not whether this transaction was valid inter partes, but whether the transferee is entitled to obtain for his transfer the hall-mark of registration under the Act of 1891. We rely upon the judgment of Ross J., and the reasons adduced by him; but we are not driven to contend that the deed was invalid inter partes. There is a restriction against alienation in sect. 54 of the Act of 1903; and sect. 38 of the Act of 1891 provides that "nothing in this Act shall affect the provisions of any Act of Parliament by which the alienation, assignment, subdivision or subletting of any land is prohibited or in any way restricted." This section was put into the Act for the express purpose of preventing sub-division during the currency of the annuity, and the draftsman obviously had in his mind the provisions of sect. 30 of the Land Law (Ireland) Act of 1881, which would conflict with sect. 35 of the Local Registration of Title Act, 1891, but for sect. 38 of that Act. Sect. 35 of the Act of 1891 has been relied on by the appellant as authorizing the transfer of the registered land, or any part thereof, but there is ample subject-matter for this section in land which was never subject to a purchase annuity, or land in respect of which the purchase annuity has come to an end. This section does not repeal the prohibitory words in the Land Code. On the death of a registered owner only one person can be registered as owner, and why should more than one be registered during his lifetime? Sect. 38, sub-s. 2, of the Act of 1891 requires the registering authority to express upon the register the prohibitive or restrictive provisions of any Act of Parliament, and accordingly the folio of Mary Geoghegan contains a note that the lands are subject to the restrictions as to subdivision, &c., contained in sect. 54 of the Irish Land Act, 1903." This, however, points to future subdivisions, &c., not to past, and then there will be nothing to show any intending purchaser from Mary Geoghegan, or indeed from the appellant, that the restrictive provisions have been contravened, and that the power of sale by the Land Commission has arisen. This shows the importance of the present question to the public; but it is also of vital importance to the Land Commission

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as affecting the security for the advance. To whom are they to look for the payment of the annuity? If there are a number of subdivisions, are they to recover the annuity in apportioned parts from all the transferees? If they exercise their power of sale, are they to recognize the rights of all the transferees, and how are they to proceed to ascertain them? The introductory words "as between the Land Commission and the proprietor," &c., only mean that the conditions apply so long only as the purchase annuity is payable. While it is payable, the prohibition applies. Subdivision is a physical fact, and it is difficult to conceive how a subdivision which is void as between the Land Commission and the proprietor can be valid as between the proprietor and his assignee. The result of reversing the decision of Ross J. will be that the Land Commission must sell in every case of subdivision, instead of, as at present, only selling as a last resort.

SIR IGNATIUS J. O'BRIEN C.:—

This case is undoubtedly one of practical importance, but its solution does not, in the view which I feel compelled to take, present any great difficulty; and I may say that any pre-conceived view I held was rather in favour of the contention put forward by the Land Commission. The case came before the Registrar of Titles on an application by Daniel Geoghegan requiring him to register the title to a portion of a holding the entire of which had been purchased by the tenant, Mary Geoghegan, under the provisions of the Irish Land Purchase Acts. Mary Geoghegan, the registered owner of the holding, had, without the previous consent of the Land Commission, assigned part of the holding to the applicant, who applied to the Land Commission for their consent to the subdivision, and, on such consent being refused, he then applied to have his title to the portion assigned to him registered under the Act of 1891. The registrar was of opinion that he was bound to effect the registration, considering as he did that there had been a valid transfer of part of the registered land such as was contemplated by sect. 35 of the Act. The case then came on appeal from the registrar to Ross J., who, influenced mainly, I think, by considerations of public policy, came to the conclusion that the decision of the registrar was erroneous. In the argument in this

Court two views were presented by the Land Commission; the first of these, which I think I am right in saying was that adopted by Ross J., is that not merely between the Land Commission and the proprietor of the holding, but also as between the proprietor of the holding and any other persons in whose favour subdivisions might be attempted, subdivision of a holding is absolutely void unless the previous consent of the Land Commission to the subdivision be obtained. If this be so, it of course follows that there was no valid transfer to the applicant which could be registered, and his application must in that case fail. The second view, which was most strongly pressed by the Land Commission before us, is that it was immaterial whether or not the subdivision was void or voidable as between the proprietress and her assignee, and that apart from this it was, by reason of the operation of the Local Registration of Title Act itself, impossible to effect the registration; and it was contended that this result followed from the true construction of sect. 38 of the Act. With neither of these views am I able to agree.

Before approaching the consideration of either of these questions, it will be useful to see what words the Legislature has employed for the purpose of rendering an admitted subdivision of land by a tenant absolutely null and void. It is unnecessary to deal at length with the provisions of the statutes by which alienation or subdivision was made inoperative as between landlord and tenant, and absolutely null and void as between the tenant and persons seeking to claim through him. It is sufficient to say that the principle of the long line of authorities of which *Gillman* v. *Murphy* (1) is one, was held by this Court in *Fogarty* v. *Shanahan* (2) to be applicable to the words contained in sect. 2 of the Act of 1881, which is in these terms: "The tenant from year to year of a tenancy to which this Act applies shall not, without the consent of the landlord in writing, subdivide his holding or sublet the same or any part thereof." *Fogarty* v. *Shanahan* (2) decided that the same construction was to be placed upon these words as upon the somewhat different words in sect. 18 of the Act of 1860—"it shall not be lawful for the tenant to sublet"—and that the effect of sect. 2 was to render absolutely

(1) I. R. 6 C. L. 34.

(2) [1896] 2 I. R. 273.

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null and void for all intents and purposes any attempted subdivision or subletting without the consent in writing of the landlord, not only as between the landlord and tenant, but also as between the tenant and any person claiming through him, the policy of the law being to prohibit such subdivision or subletting, even at the risk of causing grave injustice to individual parties. The Legislature had, in a series of statutes, adopted a certain form of phraseology which had this certain and well-recognized effect of absolutely prohibiting and rendering void any attempted subdivision or subletting without consent; and in this very Act of 1881, which contained in sect. 2 the stringent provision to which I have referred, and the effect of which was certain, having regard to the decisions given on similar sections in earlier statutes, there is a further section, sect. 30, dealing with lands which had been the subject matter of a sale by the landlord to the tenant, into which a very important alteration is introduced. These words, to which I shall presently refer, introduced for the first time into sect. 30 (and the present case must always be considered, keeping sect. 30 in view), appear to me to have no operative effect whatever if the judgment of Ross J. be correct, and if subdivision by a tenant purchaser without the previous consent of the Land Commission is void, not only as between the tenant and the Land Commission, but also as between the tenant and his assignee. Sect. 30, sub-s. 1, of the Land Act of 1881, instead of enacting simpliciter that the holding shall not be subdivided or sublet without the previous consent of the Land Commission, provides that, "As between the Land Commission and the proprietor for the time being of any holding for the purchase of which the Land Commission have advanced money in pursuance of this part of this Act, the following conditions shall be imposed so long as such holding is subject to any charge in respect of an annuity in favour of the Land Commission: that is to say, (*a*) The holding shall not be subdivided or let by such proprietor without the consent of the Land Commission until the whole charge due to the Land Commission has been repaid.'

Now, these words, "as between the Land Commission and the proprietor for the time being of any holding," were, it is to be

presumed, deliberately inserted in this section, and when we find them there we must, according to the elementary principle which underlies the construction of statutes, give effect to them if we reasonably can do so; and my difficulty in this case has been, not to give a meaning and effect to these words, but to see how we can do what we are in effect asked to do here, namely, expunge these words from the section, or at least render them nugatory by construing the section as if it amounted to a general prohibition against subdividing or subletting without the previous consent of the Land Commission.

I do not propose to deal with the question whether, if the section had not contained these preliminary words it would, in such case, render an attempted subdivision without consent absolutely null and void to all intents and purposes. That question does not arise, and I express no opinion upon it beyond saying that there might conceivably be considerations, arising from the nature of the estate vested in a tenant who has purchased the fee-simple of his holding, which would lead the Court to place a different construction upon a section so worded from that adopted in *Gillman* v. *Murphy* (1).

I wish here to refer to the view expressed by Holmes L.J. in *Farrell* v. *Donnelly* (2), with regard to these introductory words. Ross J., in the present case, did not follow this view of Holmes L.J., nor was he bound to do so, as what was said by the Lord Justice formed no portion of the judgment of the Court of Appeal in that case. What he said, however, as one might expect, was not a careless or loose observation on the section, but represented the clear view of a judge who, both at the bar and on the bench, had the widest experience of the Land Purchase Code, and I, for one, should be slow to differ from it unless I should be convinced that some fundamental error lay at the root of it. At page 6 of the report Lord Justice Holmes says: "The fallacy, however, is that there is a distinct qualification to be found in the words that begin and govern the entire section—'As between the Land Commission and the proprietor for the time being of any holding for the purchase of which the Land Commission have advanced

(1) I. R. 6 C. L. 34. (2) [1913] 1 I. R. 50, at p. 60.

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money, the following conditions shall be imposed so long as such holding is subject to any charge in respect of an annuity in favour of the Land Commission.' The subdivision forbidden in sub-sect. 1 (*a*) is only forbidden in so far as it would affect in any way the Land Commission or the annuity payable thereto. This is the only meaning that I can attach to the introductory statement."

After all the argument which has proceeded here, it is the only meaning which I can attach to the introductory words of the section. Now let us see for one moment what the position of the Land Commission is with regard to that terminable annuity. The tenant purchaser becomes the owner of the land described in the form as his "holding," and the Land Commission, who represent in this case a certain great State authority, have got the security of the land, and they are given by incorporated provisions of other statutes certain personal remedies against the tenant purchaser for the purpose of preventing the loss of that annuity, and, amongst other powers, they have a power which is absolutely effective for securing to the State the ultimate repayment of that annuity. When the arrears of the annuity are in such a position that they come to the conclusion that they can only save the State by a sale of the tenancy, they are entitled to take proceedings for the sale of the tenancy, and to sell it at a sufficient sum to recoup them, with an added sum for costs. So far as the State is concerned—and the security of that money is concerned as long as the land comprised in the holding is subject to that tremendous power on the part of the Land Commission—I am unable to see how any dealings by the tenant during his lifetime, either by means of equitable devices or subdivisions, can affect the security which the Land Commission have got for the repayment of the instalments. So long as they have the right of always disregarding the subdivision, the security for the annuity remains always the same and undiminished.

Apart from the statute, it would be a matter perfectly immaterial to them what acts the tenant might do with regard to subletting or subdivision. That is the position of affairs which would strike anyone who was drafting this code. In the earlier Act of 1870, where we find the beginning of this class of

prohibition in sect. 44, the tremendously drastic power had been inserted of enforcing a forfeiture where there was a breach of the statutory provision as to alienation; and it was a perfectly legitimate argument on behalf of the appellants that these words, which create this forfeiture of portion of the land where there was a contravention of the provision as to alienation, are omitted from the more benignant code in sect. 30. But the real meaning of sect. 30 to my mind is this—the object being the preservation of the security for the annuity—that as between the Land Commission and the tenant no operations of the tenant were to have any effect. Now the manner in which the penalty, so to speak, was imposed was most effective. The power conferred by sub-s. 2 of sect. 30 is to "cause any holding . . . or any part of such holding to be sold," &c. But there is no object in giving any more drastic construction to the section; and I find in the language of Holmes L.J. confirmation of my own belief, that there is one plain meaning to be given to the words "as between the Land Commission and the proprietor for the time being of any holding," &c. It has been suggested in argument that there are considerations of public policy prohibiting subdivision of a holding without consent, and this view appears to have been adopted by Ross J. For my own part, I share the objection of Ross J., as anyone must, to this practice of subdivision, especially in the case of small holdings; but if any such question of public policy had been intended to be given effect to by sect. 30, I should have expected that the section would have been framed on the well-settled lines to effect the desired result.

When we come to consider the corresponding sections in subsequent Acts, and in particular sect. 54 of the Irish Land Act, 1903, I find strong confirmation of the correctness of Lord Justice Holmes' construction of sect. 30. Mr. Jellett's argument has convinced me, rather against my will, that it is impossible to read sect. 54, which is almost the final development of this class of legislation, without seeing that the Legislature aimed only at effecting a restriction on subdivision without consent as between the Land Commission and the proprietor of the holding. The words of clause 1 (*a*) are taken practically verbatim from sect. 30 of the Act of 1881, and presumably have the same meaning.

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Clause 2 contains the provision that in cases coming within Part IV of the Local Registration of Title (Ireland) Act, 1891, "not more than one person shall, without the consent of the Land Commission, be registered as the owner of the holding." At the time of the passing of the Act of 1881 the Local Registration of Title Act was, of course, not in existence. The latter Act provides for the compulsory registration of the title to all land purchased under the Irish Land Purchase Code. Part IV deals with the "devolution of interest in freehold registered land sold under Purchase Acts."

Under sect. 34, which is in Part IV, the registering authority can only recognize a personal representative of a deceased owner as the owner of registered freehold land which has been purchased under the Purchase Acts; but although the personal representative is the owner at law, the next-of-kin might claim as owners in equity a subdivision, and accordingly in order to prevent any possibility of subdivision in such a case, this sub-section in the Act of 1903 in express terms prohibits the registration of more than one person as owner. It is to be observed that no further words are used which would make subdivision absolutely void, but the prohibition of registration has practically the same effect, and the importance of the matter is in the express provision in sub-s. 2 and its absence from sub-s. 1.

Sub-s. 3 of sect. 54 affords positive confirmation of what I consider to be the literal and obvious construction of sub-s. 1. This sub-sect. prohibits the mortgaging or charging of the holding for any sum or sums exceeding in the aggregate ten times the amount of the purchase annuity payable in respect thereof; and every instrument of mortgage or charge contravening this provision is declared null and void as to the excess—that is absolutely null and void. When, however, the subject-matter of subdivision was being dealt with, the Legislature not only deliberately refrained from making use of any words rendering the subdivision null and void, but did make use of the introductory words "as between the Land Commission and the proprietor," &c., which to my mind clearly and obviously limit the application of the section, and prevent us from construing it in such a way as to give the section the same effect as is produced by the express words of sect. 2 of the Act of 1881.

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An attempt was made by the respondents' counsel to construe the section in the following way:—It was suggested that as subdivision of a holding must be physical subdivision, and as subdivision is prohibited as between the Land Commission and the proprietor for the time being, it follows that subdivision is prohibited in toto, and the registering authority should accordingly refuse to register the title. This argument results in giving no effect whatsoever to the words "as between the Land Commission and the proprietors," &c., and for that reason alone I cannot accede to it.

I now come to a further argument which was pressed upon us, and which I am equally unable to accept. The Local Registration of Title Act is—it seems almost pedantic to say it—one enacted for the purposes of the registration of titles; it was not intended by it to set up a tribunal having the power of either destroying titles or setting up new titles. The duty of the registering authority is to keep titles as they were, subject to the new forms which the statute introduced; the statute contemplates the preservation of rights, be they rights of property or rights in the nature of charges and incumbrances or otherwise, not the destruction of such rights. I refer to this for the following purpose:—I have already given my reasons for holding, as I do clearly, that under sect. 30 of the Act of 1881, and by reason of the introductory words of that section, an attempted conveyance of part of a holding by the tenant was not void to all intents and purposes, but only "as between the Land Commission and the proprietor," &c. It would be extraordinary that the registering authority under the Act of 1891 should have imposed upon him the duty and obligation of destroying the title of the transferee; this, however, is the result which must follow if the respondents' argument be correct, and as no title passes until registration, the registering authority who refuses to register, and who it is said is bound to so refuse, does in effect destroy the title of the transferee, although that title was not null and void to all intents and purposes, but only voidable as between the Land Commission and the proprietor. That to my mind is to place the registering authority in a position other than that intended by the statute, and this in the face of

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sect. 35, sub-s. 1, of the Act, which provides in express terms that "a registered owner of land may transfer the land or any part thereof, and the transferee shall be registered as owner of the land transferred." The Legislature might of course either deliberately or per incuriam have enacted a section having this extraordinary effect, and we have been told that they have done so in sect. 38, sub-s. 1, of the Act of 1891, which provides that "nothing in this Act shall affect the provisions of any Act of Parliament by which the alienation, assignment, subdivision, or subletting of any land is prohibited or in any way restricted."

I have endeavoured, with the utmost care, to understand the argument of respondent's counsel based on sect. 38; but, so far from aiding their argument, it seems to me that this section is entirely destructive of it. Certain obligations or rights with regard to registered lands are dealt with in the portion of the statute relating to burdens and their registration. Certain classes of burdens are made to affect the lands even though not registered. There remained, however, a further class which the draftsman of the Act thought might require to be specially legislated for, lest they might per incuriam be destroyed by this Act of 1891, and this class includes, amongst others, provisions in Acts of Parliament by which alienation or subdivision was prohibited or restricted. Accordingly, in order to prevent the abrogation of any such provisions, it is expressly enacted that the statute shall not have the effect of destroying them. This section only does what it purports to do, namely, to prevent the destruction of these provisions as to alienation, &c. How it can enlarge the effect of any such provisions I am unable to understand. The previous Acts, according to the view I take of them, had effectually prevented the alienation of holdings as between the Land Commission and the proprietor of the holding, whilst permitting it as between the tenant and his assignee, subject, of course, to the frailty attaching to the title of the assignee if the Land Commission thought fit to exercise their power of sale over the lands. The registration of the title of the assignee seems to me to leave matters as they were before the registration so far as this question of alienation is concerned, and it is the duty of the registering authority under sect. 38, sub-s. 2, to note

upon the face of the register the prohibitive or restrictive provisions in question.

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No practical difficulty will ensue from our decision. Every purchaser of a portion of a holding requires evidence that the annuity is not in arrear. He must also ask the question, Has the Land Commission assented to the subdivision? If there has been no consent, no purchaser would complete. If there has been consent, the title is all right. It is a different proposition to say that the registering authority is not to carry out the obvious obligation imposed on him by sect. 35, subject always to the provisions of sect. 38.

Accordingly, I am clearly of opinion that there is nothing in the Act of 1891 which compels the registering authority to disregard the provisions of sect. 35 of the Act. The result, so far as the Land Commission are concerned, is that their overriding power of sale remains perfectly intact; so far as they are concerned the holding remains one, and if people are foolish enough to purchase portions of holdings without having obtained the consent of the Land Commission, they must bear the consequences. I have only to add that I think it is perhaps unfortunate that there is no express provision in the rules compulsorily requiring notice to be served on the Land Commission prior to registration in cases of this nature. I also think it is remarkable that there is no provision for inserting on the face of the folio notice of the fact that the consent of the Land Commission to the subdivision has not been obtained, when that is the case. These are matters to be considered by the rule-making authority.

The appeal must be allowed with costs.

RONAN L.J.:—

The registered owner of lands purchased under the Irish Land Act, 1903, and subject to an annuity, assigned portion of the lands; the transferee applied to the Land Commission for their consent to the subdivision of the lands, and on this consent being refused, he applied to the registering authority to register his title. The question is: whether the registrar is bound to do so. The deed was a voluntary one, but precisely the same question would have arisen if it had been one executed for a valuable consideration.

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As Ross J. stated at the commencement of his judgment, "We are all familiar with the statutes forming the code prohibiting assignment and subletting, and with the numerous decisions thereon." The code, however, prohibits assignment and subdivision of tenancies held by tenants, that is to say, the Courts were dealing with cases where the relationship of landlord and tenant subsisted, and, so far as I know, *Farrell* v. *Donnelly* (1) is the only case to be found in the books where provisions restricting alienation and subletting have been considered in relation, not to tenancies, but to holdings the fee-simple of which had been acquired by tenant purchasers under the Land Purchase Acts. I should, indeed, be slow to differ from the opinion expressed by Holmes L.J. in that case, which I consider to be a clear and specific authority in favour of the present appellant.

When the relationship of landlord and tenant subsists, provisions restricting alienation and subdivision and rendering them in some cases void, in others voidable, are perfectly legitimate at common law, though such provisions are repugnant to an estate in fee-simple. *M'Naul's Estate* (2), in which this Court overruled the decision in *Billing* v. *Welch* (3), is an interesting example of this principle. The latter case was one of a renewable lease which had been converted under the provisions of the Renewable Leasehold Conversion Act into a fee-farm grant. The lease contained a covenant prohibiting alienation, and on the conversion of the lease a similar provision was inserted in the grant. O'Brien J., who was a great lawyer, held that such a covenant was repugnant to the nature of a fee-simple estate, and therefore void, although when contained in the lease it was perfectly valid. That case was considered by this Court in *M'Naul's Estate* (2), and the decision of O'Brien J. was overruled. But why? Because on a minute examination of the provisions of the Renewable Leasehold Conversion Act—the effect of which might at first sight be supposed to be similar to that of the Land Purchase Acts, namely, to convert the tenant into an owner in fee—this Court was satisfied that the new fee-simple estate was to be subject to all the covenants formerly contained in the lease, save in so far as they had been commuted; and that the former owner in fee, who became the

(1) [1913] 1 I. R. 50. (2) [1902] 1 I. R. 114. (3) I. R. 6 C. L. 88.

owner of a rent-charge, was in other respects to be in the same position as he was in before. But Walker L.J. in that case clearly recognized the principle which I have mentioned. He says, at p. 131—"It is true that a clause against alienation is inconsistent with the nature of a common law fee-simple estate, and therefore inoperative where such an estate is granted." The learned Lord Justice, however, agreed with the other members of the Court that the statutory fee-simple, brought into being under the Act, was not a common law estate in fee; and in the words of FitzGibbon L.J., "that the doctrine of repugnancy applicable at common law to an estate in fee is modified, in the case of fee-farm grants founded on renewable leases, by whatever obligations are lawfully inserted in the grants."

[His Lordship referred to sects. 1–7 of the Renewal Leasehold Conversion Act, and continued.] It is clear, then, that the object of the Legislature under this Act was to leave the relationship of landlord and tenant substantially subsisting, while dispensing with the necessity for the perpetual renewal of leases, and accordingly we find that the rights and remedies of the parties remain much the same as before, the grantee, for example, being still subject to ejectment for non-payment of rent. In my judgment, however, the policy of the Land Purchase Acts is quite different. There the intention of the Legislature was to convert the occupying tenant into the owner of a real fee-simple estate; and although the Land Commission in one sense becomes substituted for the landlord, the tenant no longer remains subject to the former incidents of tenure. Ejectment for non-payment of rent disappears, and the rights of the Land Commission are specifically defined in the statutes themselves. These are not the rights of a landlord, but those of the owner of a rent-charge in fee, against parties who are owners of a common law fee-simple estate in the lands. The distinction between such an owner and the owner of a statutory fee-simple under the Renewable Leasehold Conversion Act is, to my mind, a fundamental one.

In *Butler* v. *Smith* (1), decided a few years after the passing of the Act of 1860, it was held, in the case of a lease containing a covenant against alienation without the written consent of the

(1) 16 I. C. C. R. 213.

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landlord that an assignment made contrary to this provision was absolutely void, and that nothing passed to the assignee thereunder. In *Earl of Donoughmore* v. *Forrest* (1), decided in 1871, a lease which contained an agreement prohibiting alienation without the consent in writing of the landlord was assigned without such consent. The assignee paid rent to the landlord, and received receipts for rent, yet when he subsequently withheld payment, the Exchequer Chamber held that the landlord could not maintain an action on the covenant for the rent, the assignment being absolutely void under the 10th sect. of the Act of 1860—a decision which Christian L.J. characterized as a reductio ad absurdum. Then came *Gillman* v. *Murphy* (2)—the first case in which I was engaged in the Superior Courts—where in similar circumstances the assignor recovered possession in an ejectment against his own assignee—a decision which Christian L.J. characterized as a reductio ad latrocinium: *Doody* v. *Nolan* (3).

In *O'Kane* v. *Burns* (4), FitzGibbon L.J. commented very strongly on the drastic effect of the previous decisions dealing with these restrictive provisions of the Land Acts, but he concurred in holding the Court bound by them. "We cannot," he said, "now re-open the question whether the views which Fitzgerald B. and Christian L.J. presented in cogent and forcible language ought to prevail. We are bound to hold the lease absolutely null and void on the ground of illegality."

I have already pointed out the radical distinction between conditions against alienation and subletting relating to tenancies, and similar conditions relating to estates in fee-simples; and I have pointed to the disapproval, by judges of the highest authority, of the construction placed by the Courts on the former. The decision of Ross J. in the present case is, however, an extension of the principle laid down in *Gillman* v. *Murphy* (2) to cases of estates held in fee-simple; and if he be right in his view, it would follow that, if this assignment had been for value, and the assignor had received the purchase-money, he could, nevertheless, have brought an ejectment against his assignee and recovered back the land, as was done in *Gillman* v. *Murphy* (2). Speaking for myself,

(1) I. R. 5 C. L. 443.
(2) I. R. 6 C. L. 34.
(3) I. R. 215.
(4) [1897] 2 I. R. 592, at p. 595.

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even if the language of the sections had been the same, I think I should have refused to extend this principle (involving both a reductio ad absurdum and a reductio ad latrocinium) to the case of alienation of a fee-simple estate.

Counsel for the respondents, while relying upon the judgment of Ross J., have, however, contended that even if the assignment in question was valid inter partes, the registering authority should have refused to register it; and they have relied strongly upon sect. 38 of the Local Registration of Title Act. What is the effect of this argument? The owner of a large farm, which is registered under the Act, assigns portion of it for valuable consideration without the consent of the Land Commission, and he receives the purchase price. Assuming this transaction to be valid between the assignor and assignee, and that the latter obtains a valid conveyance, subject only to the possibility of the Land Commission putting into force their compulsory power of sale, is this transaction, otherwise valid, to be wholly avoided by the Local Registration of Title Act? It cannot be avoided by sub-s. 1 of sect. 38 of the Act, which provides that "nothing in this Act shall affect the provisions of any Act of Parliament by which the alienation, assignment, subdivision, or subletting of any land is prohibited or in any way restricted," and ex hypothesi no such prohibition or restriction exists. But under sect. 25 of the Act, unless the conveyance is registered, no estate passes to the assignee, and accordingly, if the registering authority were to refuse to register this conveyance, the result would be that, although otherwise valid, it would in effect be rendered absolutely null and void. It is clear to my mind that sect. 38 merely preserves the effect of the prohibitory sections of the code, and adds nothing thereto; were it otherwise, the registering authority would, as pointed out by the Lord Chancellor, have a jurisdiction conferred upon him which would enable him to destroy titles, instead of preserving them by means of registration, which was the object of the Legislature.

Ross J. states in his judgment (p. 367): "In this case it has been forcibly contended that the door that has been kept bolted and barred so long is now thrown open to the Irish tenants." But the learned judge overlooks the distinction which I have endeavoured to point out between the Irish tenant and the Irish

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proprietor of a fee-simple estate. I know of no case which shows that any door was ever bolted and barred against the latter in respect of this question of alienation and subdivision. The learned judge says, "If a change so momentous has been introduced, I should expect it to be expressed in unambiguous language." I, however, should have expected to find any restriction on the right of a holder in fee-simple to dispose of his property to be so expressed.

I can only say that the correct and exhaustive analysis of the statutes contained in the decision of Mr. Manders completely relieves me from the necessity of going through them in detail, and I adopt the view so clearly put forward by him. I am unable to see what effect Ross J. has given to the words "as between the Land Commission and the proprietor." He appears to read the words "the Land Commission" as meaning "every other person." According to the well-known rule of construction, however, effect must be given to all the words of this section, and we cannot either disregard those introductory words, or construe them as meaning something which they do not mean.

The learned judge then says (p. 368):—"The tenant becomes a proprietor, and the Land Commission, who have advanced the money, have the power to prevent alienation by withholding consent." With all respect, they have not. They have the power to sell if alienation takes place without consent; but they have no power to deal with the assignee as if the sale had not taken place. They must treat the assignment as valid between the assignor and the assignee on the occasion of a compulsory sale, and although, under sect. 55 of the Act of 1903, the holding is sold "subject to the purchase annuity (if any), and any charge under any Public Works Acts, but discharged from all other claims or incumbrances of all persons whomsoever who are interested in the holding," yet all such claims attach under this section to the purchase-money "in like manner as immediately before the date of the sale they attached to the holding." Accordingly, as the alienation was perfectly valid as between the assignor and the assignee, the Land Commission must recognize this fact, and pay the balance of the purchase-money to the person entitled to it, namely, the assignee. The words in sub-s. 3 of sect. 30 of

the Act of 1881 were "shall pay the balance to the persons appearing to the Land Commission to be for the time being entitled to receive the same."

Contrasting the words of sect. 2 of the Act of 1881, containing an absolute prohibition of subdivision or subletting, with those of sect. 30, limited and controlled by the introductory words "as between the Land Commission and the proprietor," and, again, contrasting the words of sect. 54, sub-s. 1, of the Act of 1903, limited and controlled by the same words, with those of sub-s. 3 of the same section, imposing an absolute prohibition of any mortgage or charge exceeding the prohibited limit, and declaring the excess absolutely null and void, I am quite unable, as we are asked to do, to hold the prohibition to be the same in the one case as in the other. The change of language introduced by the Legislature is too striking for me to come to any other conclusion.

I agree with the Lord Chancellor that the appeal should be allowed.

MOLONY L.J.:—

I agree with the Lord Chancellor. Mary Geoghegan was the owner of a small holding which she had purchased under the Irish Land Act, 1903. She was duly registered as owner in fee-simple, subject to equities, on the 20th June, 1912, and remained in full possession until the 25th May, 1916, when she assigned a small portion of the holding to her son Daniel Geoghegan. This took place without the consent of the Irish Land Commission, which had been withheld, and Daniel subsequently applied to be registered as owner in fee-simple of the portion of the holding which had been assigned to him. The question is whether he is so entitled. We have heard from Mr. Jellett an historical dissertation of great interest and value, on the various statutes containing provisions restrictive of alienation, subdivision, and subletting of holdings, going back to the Act of 1860. It is no doubt desirable, in dealing with sect. 54 of the Act of 1903, to bear in mind the previous legislation analogous to the present subject, such as is found in sects. 10 and 18 of the Act of 1860, when in prohibiting, in the one section assignments, and in the other sublettings, contrary to agreement and without the necessary consent,

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the words used are "it shall not be lawful"; and it was held in *Butler* v. *Smith* (1) that an assignment, and in *Jayoe* v. *Harrington* (2) that a subletting, in breach of the statutory provision is absolutely null and void. It is unnecessary for me to refer further to these provisions of the Act of 1860, which were interpreted so strictly in many cases, such as *Donoughmore* v. *Forrest* (3) and *Gillman* v. *Murphy* (4), as to lead to results which have been frequently regretted by judges of great authority.

Passing to the Act of 1870, which for the first time empowered the advance of public money for the purpose of enabling tenants to acquire their holdings, we find that by sect. 44, following the policy of the Land Act of 1860, the alienation or subdivision of purchased holdings was in express terms prohibited during such time as the purchase annuity remained payable; and in this connexion I may say that I do not agree with Lord Justice Ronan in thinking that even if the language of sect. 54 of the Act of 1903 followed the language of the sections in the earlier part of this code, the same strict interpretation ought not to be adopted, having regard to the nature of a fee-simple estate as compared with a tenancy held under a landlord. The fact that public money has been advanced on the security of a terminable annuity must be borne in mind, and so long at least as that annuity remains payable I think that restrictions on alienation, where such restrictions are created, ought to be given their full effect. By sect. 44 of the Act of 1870 any alienation by a purchaser to whom the section applied was in terms forbidden, without the consent of the Board of Works—"No purchaser shall . . . alienate," &c.; and for the purpose of enforcing the prohibition the section provides for a complete forfeiture to the Board of the part of the holding alienated or subdivided without consent, to be held by them for public purposes. That was an extreme penalty, and after a short time this was recognized, and by sect. 2 of the Act of 1872 power was given to the Board to sell the holdings and to pay the balance of the purchase-money to "the person entitled by law to receive the same," instead of recourse being had to the penalty of forfeiture.

(1) 16 I. C. L. R. 213.
(2) 10 L. R. Ir. 335.
(3) I. R. 5 C. L. 443.
(4) I. R. 6 C. L. 34.

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The next statute to be considered is the Act of 1881, and I agree with my colleagues that a striking contrast is here to be found between the language of sect. 2, prohibiting subdivision and subletting in cases of landlord and tenant without the consent of the landlord, and that of sect. 30, prohibiting "as between the Land Commission and the proprietor" the subdivision or subletting of a purchased holding, without the consent of the Land Commission, until their charge shall have been repaid. Sect. 2 practically follows the wording of sects. 10 and 18 of the Act of 1860, and, as was held by this Court in *Fogarty* v. *Shanahan* (1), it amounts to a distinct and absolute prohibition of subdivision or subletting. FitzGibbon L.J. there pointed out that the words "shall not" in this section of the Act of 1881 imply a prohibition as effective as the words "it shall not be lawful" in sects. 10 and 18 of the Act of 1860. When, however, we come to sect. 30 of the Act of 1881 we find the Legislature dealing with an entirely different subject-matter. Public money was to be advanced to enable occupying tenants to acquire the fee-simple of their holdings, and it was the object of the Legislature that freeholds should be acquired by them with all the incidents of freehold tenure, subject only to the paramount consideration that the repayment of the public money advanced by the State should be adequately secured. The draftsman of this section, then, having in his mind the very serious consequences of the construction which the Courts, however unwillingly in some cases, had felt constrained to place upon the earlier prohibitive sections, was anxious, and rightly anxious, that the prohibition contained in sect. 30 should be limited by those introductory words, and that this limited prohibition should be effective only so long as the security of the Land Commission demanded it, that is until the whole charge due to them had been repaid. If this be not so, it is impossible to see for what reason these words were introduced into the section. This was the position down to the passing of the Local Registration of Title (Ireland) Act, 1891, and it is contended that, although a purchaser of portion of a holding might have got a title prior to that Act which was good against all the world, subject only to the over-riding power of sale vested

(1) [1896] 2 I. R. 273.

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in the Land Commission if they choose to exercise that power, yet, in some way by the operation of sect. 38 of the Act of 1891, the title of such a purchaser is invalidated.

As has already been pointed out by the Lord Chancellor and Lord Justice Ronan, the object of this Act was to register the titles of lands in Ireland, not to destroy or alter them, and the purport of sect. 38 is to my mind clear. It was to declare that the effect of the Act of 1891 was in no way to interfere with any of the existing prohibitive or restrictive provisions to which I have referred. They were to retain their full force; but, at the same time, there was to be a note on the face of the folio, which would give express notice of such provisions to any person who, without having obtained the consent of the Land Commission, might elect to purchase or become tenant of portion of a holding in respect of which a purchase annuity was payable.

I now come to sect. 54 of the Act of 1903. Undoubtedly, sect. 30 of the Act of 1881 was limited to the period during which the charge to the Land Commission remained unpaid, while this limitation, apparently by some error, was omitted from sect. 54 of the later Act, but the limitation was restored by sect. 32, sub-s. 4, of the Act of 1909, and the effect of the present legislation is that so long as the purchase annuity remains payable to the Land Commission then "as between the Land Commission and the proprietor of the holding" the holding is not to be subdivided or sublet without the consent of the Land Commission. If this provision is contravened the Land Commission may cause the holding to be sold—a power which affords a perfect security for the repayment of the advance. In my judgment we are bound to give weight to those introductory words, and I agree with the other members of the Court that if we were to accede to the contention of the respondents we would in effect expunge them from the statute.

I agree that the appeal should be allowed.

Solicitor for the appellant: *Robert A. Macaulay.*

Solicitor for the respondent: *The Solicitor to the Land Commission.*

R. ST. J. C.

THE LOCAL GOVERNMENT BOARD FOR IRELAND AND THE ATTORNEY-GENERAL FOR IRELAND *v.* THE COUNTY COUNCILS OF THE NORTH AND SOUTH RIDINGS OF THE COUNTY TIPPERARY (1).

1 P.
Feb. 20, 21, March 7.

Local Government—Asylum Joint Committee—Committee of County Council—Public Body—Audit Fee—Local Government (Ireland) Act, 1898 (61 & 62 *Vict. c.* 37), *ss.* 9, 64, 84—*Application of Enactments Order*, 1898, *Art.* 19.

A District Asylum Committee is not a Committee of a County Council, and the accounts of a District Asylum Committee are not the accounts of a County Council, and do not come within the provisions of sect. 64 of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), fixing an inclusive fee for auditing the accounts of a County Council.

TRIAL OF ACTION.

The claim of the plaintiffs was for a declaration that the joint committee of the Clonmel District Lunatic Asylum was a public body within the meaning of the Local Government Board (Ireland) Act, 1872 (35 & 36 Vict. c. 69), sect. 6, and was liable to pay the amounts from time to time determined by the Local Government Board to be charged for auditing the accounts of the said joint committee. The defendants were sued jointly as representing the joint committee of the Clonmel District Lunatic Asylum pursuant to 61 & 62 Vict. c. 37, sect. 9, sub-s. 9. The defendants contended that the joint committee was a committee of the county councils within the meaning of Article 19 of the Application of Enactments Order, 1898, and that the charge for auditing the accounts of the joint committee should be included in the sum of £100 charged for auditing the accounts of a county council under sect. 64 of the Local Government (Ireland) Act, 1898.

Wylie K.C. (with him *Serjeant Sullivan K.C.*, and *Scaly*), for the plaintiffs:—

The joint committee is a public body, and as such is liable to pay an audit fee separate and apart from that paid by the county councils which appoint it. Prior to the Local Government

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(Ireland) Act, 1898, the Lord Lieutenant appointed governors for each asylum and also a general Board of Control under 1 & 2 Geo. 4, c. 33, and 18 & 19 Vict. c. 109. The provision and management of lunatic asylums are now regulated by sect. 9 of the Local Government Act, 1898, which is mandatory on county councils. Under that section the duties of the county council are to be exercised through a committee appointed by them (sub-s. 2). This committee is not a committee of the county council, but a public body having a separate legal existence. It may include persons who are not members of the council; its acts need not be confirmed by the council (sub-s. 3); it appoints and removes the officers of the asylum (sub-s. 5 and sect. 84), and mandamus lies against the committee to enforce the performance of this duty: *R.* (*Courtenay*) v. *Carlow Joint Committee* (1); *R.* (*Considine*) v. *Cork Asylum Joint Committee* (2).

The provisions of sub-s. 9 would be unnecessary if the committee were, as the defendants allege, a mere delegate or agent of the county council: *Maguire & Gatchell* v. *Tyrone and Fermanagh County Councils* (3). The duration in office of the members of a joint committee is longer than that of the county councils who appoint them: sect. 94, sub-s. 15. Further, by Article 22 (11) of the Application of Enactments Order, 1899, "a joint committee of the councils of counties comprised in a lunatic asylum district may . . . exercise jointly for the purpose of a lunatic asylum the powers of those councils relating to borrowing": a joint committee borrows in its own name, and is subject only to the regulations of the Local Government Board, and not to the limitations on the borrowing powers of county councils. (See Regulations of 1st December, 1899, Vanston, vol. ii, p. 1423.)

The powers and functions of an asylum committee are wholly different from those of the ordinary committees appointed by county councils under sects. 20 and 39 of the Local Government Act, 1898, and Article 38 of the Application of Enactments Order, 1898. The word "committee" is thus defined by Pollock C.B. in *Reynell* v. *Lewis* (4): "The term 'committee' means an individual or a body to which others have committed or delegated a particular

(1) [1909] 2 I. R. 276.
(2) 48 I. L. T. R. 103.
(3) 36 I. L. T. R. 38.
(4) 15 M. & W., at p. 529.

duty, or who have taken on themselves to perform it in the expectation of their act being confirmed by the body they profess to represent or act for." The authority of an asylum committee is not delegated to it by the county council, but is vested in it by statute, and its acts need no ratification by the county council. The connotation of "committee" as used in this connexion is wholly different from its connotation as used elsewhere in the Local Government Acts. Although the county council provides the funds required by the asylum committee, it exercises no more control than it does in the case of a district council, and the funds are provided in the same way in response to a bulk demand. An asylum committee comes within the definition of "public body" contained in the Local Government (Ireland) Act, 1902, sect. 23.

The provisions relating to the fees for auditing the accounts of a county council are contained in sect. 64 of the Local Government (Ireland) Act, 1898, sect. 6 of the Local Government Board (Ireland) Act, 1872, and the Application of Enactments Order, 1898, sect. 19. Prior to 1868 the accounts of a district lunatic asylum were audited by a specially appointed auditor under 1 & 2 Geo. 4, c. 33; the provisions of that Act were superseded by the Lunatic Asylums Accounts Audit Act, 1868, as altered by the Local Government Board (Ireland) Act, 1872, sect. 6. [They also referred to *The Local Government Board* v. *M'Donnell* (1).]

Conner K.C., *Clancy K.C.* (with them *O'Byrne*), for the defendants:—

The only question is whether the accounts of a joint asylum committee are the accounts of a county council, and so come within the provisions of sect. 64 of the Act of 1898. A joint asylum committee is a committee of the county councils; its powers are delegated none the less that the delegation is statutory. The provisions of sub-sects. 7, 8, and 9 of sect. 9 of the Act of 1898, on which the plaintiffs rely, are introduced solely with reference to the case of asylum committees representing more than one county council; they are unnecessary where the asylum district does not extend beyond a single county. The property, debts, and

(1) Unreported.

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liabilities of lunatic asylums were transferred to county councils by article 15 (5) of the Application of Enactments Order, 1898. *R.* (*Courtenay*) v. *Carlow Joint Committee* (1) only decided that sect. 9 (5) of the Act of 1898 laid the duty of appointing officers on the asylum committee, but the fact that the committee has certain statutory duties does not make it the less a committee of the county council. The accounts of a county council include the accounts of its committees and officers: Application of Enactments Order, 1898, article 19. [They referred to *Keeffe* v. *Shaughnessy* (2); *Lynch* v. *O'Regan* (3); *Keeffe* v. *M'Mahon* (4).]

Serjeant Sullivan K.C., in reply:—

Articles 36 (4) and (5) and 38 of the Application of Enactments Order, 1898, do not apply to a joint asylum committee: article 19 (1) and (2) is complementary to article 18, which works out sect. 47 of the Act.

Cur. adv. vult.

March 7.

O'CONNOR M.R.:—

This action has been brought by the Local Government Board for Ireland and the Attorney-General against the two county councils of the North and South Ridings of the county Tipperary for a declaration by the Court that the defendants are liable to pay to the plaintiffs certain fees for auditing the accounts of the joint committee of the Clonmel district lunatic asylum, whose district embraces the area which comprises both ridings of the county Tipperary. The fees claimed are calculated at the rate of £40 per annum, and the amount of the claim is £160, being for the four years ending, respectively, on the 31st March, 1914, 31st March, 1915, 31st March, 1916, and 31st March, 1917.

As the action was brought for the purpose of establishing a principle, and putting an end to a long-standing dispute, the plaintiffs, by their counsel at the bar, waive their claim in respect of the first three years, and seek only to recover the sum of £40 in respect of the year ending the 31st March, 1917.

(1) [1909] 2 I. R. 276.
(2) [1915] 2 I. R. 105.
(3) [1915] 2 I. R. 267.
(4) [1915] 2 I. R. 312.

Although the county councils are the nominal and legally the real defendants, their liability in the matter is through the joint committee, and that liability, if established, must be discharged through the latter. Several defences have been pleaded, but all save one were abandoned at the bar, and the only question which now remains for decision is whether the accounts of a committee of a district lunatic asylum are the accounts of the several county councils which they represent when the committee is a joint committee of two or more councils, or of one county council when the committee is appointed by that council alone. This question arises under the 64th section of the Local Government Act, 1898, which enacts that the charge for auditing the accounts of a county council in any year shall not exceed the sum of £100.

The defendants say that each of the county councils had already paid the sum of £100 for the auditing of its accounts, and that there is no further liability. The plaintiffs, on the other hand, say that the accounts of a committee of a district lunatic asylum are not the accounts of the county councils within the meaning of the section, and that they are entitled to claim separate fees for auditing them. Although the question turns upon the meaning of one section of the Local Government Act, 1898, it is necessary for a full appreciation of its meaning to trace the history of the legislation which led up to the present position of district lunatic asylums, and to examine many of the provisions of the Acts which relate to them.

Previous to the passing of the Local Government Act, 1898, each district lunatic asylum was under the control of governors or directors, appointed by the Lord Lieutenant, and they were subject to a general Board of Control, also appointed by the Lord Lieutenant. The district asylums were in no way subject to county management, although partly maintained by the aid of presentments levied off the counties. While thus constituted, the accounts of district lunatic asylums were subject to audit under the Lunatic Asylums (Ireland) Accounts Audit Act, 1868, and, by the 6th section, the auditor appointed for the purpose was the auditor of accounts relating to the relief of the poor for the union in which such asylum was situate. By the 11th section the remuneration of the auditor was fixed at a rate of not less than

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£2 2s. per day, which was payable out of the funds of the asylum. This mode of remuneration was altered by the Local Government Board (Ireland) Act, 1872, which enacted, by sect. 6, that any auditor of poor law unions in Ireland who should be appointed to audit the accounts of other public bodies in addition to the accounts of the boards of guardians of unions should not receive for that duty remuneration beyond the amount of his yearly salary, any enactment to the contrary notwithstanding, and every such enactment was thereby repealed. The section also provided that the salaries should be such as the Local Government Board should determine, with the approval of the Treasury, and that the Local Government Board should from time to time ascertain and determine what proportion of the salaries paid to the auditors should be charged in respect of the audit of the accounts of such public bodies respectively, and the amount so ascertained in respect of each such body should be payable by such body. It is clear that the governors of a district asylum were a public body within the meaning of the Act.

Such were the provisions for the audit of district lunatic asylum accounts and the payment of auditors at the passing of the Local Government Act, 1898. By this Act the constitution of the governing bodies of district asylums was fundamentally changed. In accordance with the general policy of the Act the management was transferred from the central government to the county councils created by the Act, and the responsibility for the maintenance of the district asylums was thrown upon the councils. This was accomplished by the 9th section of the Act, which in the first place provided that it should be the duty of the council of every county to provide and maintain sufficient accommodation for the lunatic poor in that county in accordance with the Lunatic Asylums Acts; that the duties of the council should be exercised through a committee appointed by them, some of the members of which might not be members of the county council; that there should be transferred to the council acting through the committee the business of the governors and directors of the asylum under the Lunatic Asylums Acts, and that the committee, subject to the general control of the council as respects finance, might act without their acts being confirmed by the council. It was also provided

that the county council, through the committee, should properly manage and maintain every lunatic asylum for their county, and might appoint and remove officers and regulate expenditure, and that the powers of the Lord Lieutenant in these respects over asylums should cease, and that the Board of Control should be abolished. It was further provided that when a district for a lunatic asylum should comprise two or more counties, the section should apply with the necessary modifications to these counties and to the councils thereof, and that the expenses should be defrayed by the several counties in proportion to the number of lunatics from each county, and that the committee for the asylum should be a joint committee of the councils of the counties with a representation of each council in the same proportion as that in which the expenses are defrayed. It was also provided that where a county council should fail or refuse to provide funds for any object approved of by any such joint committee, the joint committee might, except where the majority of the county councils represented on such joint committee should so fail or refuse, appeal to the Lord Lieutenant, and the said county council should comply with any order made by the Lord Lieutenant upon that appeal. Lastly, it was provided that proceedings had or taken by any such joint committee should be had or taken in the names of the said councils jointly, and proceedings had or taken against any such joint committee should be had or taken against such councils jointly.

A critical analysis of this section exposes some difficulties in construction. For instance, it is difficult to reconcile the power which is given to the committee to regulate expenditure with the general control of the councils as respects finance. If there is a difference of opinion between a council and its committee on expenditure, which I cannot separate from finance, or a difference between one county council and a joint committee of that council and another council, which is to prevail? or if the majority of the county councils represented in a joint committee fail or refuse to provide funds for an object approved by a joint committee—the object being something appertaining to the proper maintenance of an asylum—how is the failure or refusal to be dealt with in face of the exclusion of the right of appeal to the Lord Lieutenant

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in such a case? These questions raise difficulties which happily I do not feel called on to solve. They are beside the only question which is presented by the present case, viz.:—Are the accounts of such a committee as the section has called into being the accounts of a county council, whether in the case of a committee for one council only, or of a joint committee acting for two or more councils? The Local Government Board says, no; and that consequently the fee of £100, provided by sect. 64 for auditing a county council's accounts, does not cover the audit of an asylum committee's accounts. The defendant county councils say, yes; and that having paid £100 each, they are not liable for more.

The broad argument for the councils is that the accounts of a committee are the accounts of the body which appoints it. This as a general proposition may be accepted, because, as a general rule, a committee acts under a delegated authority, and it is merely for convenience of administration that some special work, which it is the duty of the delegating body itself to perform, is entrusted to a committee. But when we have a committee which has independent statutory authority, and not a mere delegated authority, and when it is the legal right and duty of that committee to render public services, which the body itself is disabled by statute from performing except through the committee, and the only duty of the body is to meet the money demands of the committee, then I cannot assent to the proposition that the accounts of the committee are the accounts of the body. The committee has itself an independent legal existence, even though it acts for and on behalf of the body, and must sue and be sued in the name of the body.

If this is the legal position in the case of a single county committee, the separate and independent legal status of a district asylum joint committee of several county councils is more obviously clear. If the joint committee is not an independent authority, but acts as the mere delegate of several county councils, deriving its authority from them, it must be subject to their control, and every decision it comes to is liable to be overruled. This might render the performance of legal obligations impossible, because one county council might take one view and another the opposite. Take the case of the accounts of the joint committee. If the joint committee is the mere delegate of the several county councils,

it follows as a logical consequence that the accounts are those of the county councils. But see where this would lead us. In a case like that of the Richmond District Lunatic Asylum, which serves a district containing five counties, the accounts of the joint committee would be the accounts of five county councils, and should be audited five times, or the accounts of five county councils and the accounts of the joint committee should be audited at the same time and place. There is no warrant for any such extravagant result, nor is there any reason whatever for a county council to concern itself with an audit of a lunatic asylum's accounts, for no matter what may be the power of a council conferred by giving it a general control over finance, the duty of making disbursements is discharged by simply meeting the demands of the joint committee, while no moneys whatever are received by the county councils on account of lunatic asylums.

There may be committees of county councils and joint committees of several county councils with only a delegated authority, and the accounts of these committees are the accounts of their county councils. This is provided for by sects. 36 and 38 of the Application of Enactments Order, but reference to these shows that the authority in such cases is strictly a delegated one, merely permissive and subject to such limitations as the councils may place upon it. The provisions of the sections are such as are inapplicable to district asylum committees and do not govern them. This is so apparent that I need not read the sections; but there is one provision that deserves special reference, and that is the provision that the accounts of a joint committee appointed under sect. 38 shall be deemed to be the accounts of the county councils and their officers. There is no such provision to be found in the case of a district asylum committee, which most obviously is entirely outside the scope of sections 36 and 38. Indeed, as was well pointed out by Serjeant Sullivan, almost every provision in these sections is incapable of application to district asylum committees.

For these reasons I am clearly of opinion that the accounts of a district asylum committee are not the accounts of a county council, and do not come within sect. 64 of the Local Government Act, 1898, so as to prevent the Local Government Board from making a separate and additional charge for auditing lunatic

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asylum accounts over and above the sum of £100 payable by the county councils for the audit of their accounts. But the matter is made still more clear by sect. 19 of the Application of Enactments Order. Before the passing of the Local Government Act, 1898, the accounts of lunatic asylums were, as I have said, subject to separate audit under the Lunatic Asylums (Ireland) Accounts Audit Act, 1868, by the auditors of poor law unions, subject to the provisions of the Local Government (Ireland) Acts, 1871 and 1872. I have already referred to sect. 6 of the latter Act, which enabled the Local Government Board to determine what proportion of the auditor's salary should be charged in respect of the audit of each public body. At that time the governing body of a lunatic asylum was without doubt a separate public body. It was not even designated a committee of any other public body, so that it necessarily comes within the section. The Lunatic Asylums (Ireland) Accounts Audit Act, 1868, was repealed by the Local Government Act, 1898; but sect. 19 of the Application of Enactments Order, sub-s. 2, provides for the audit of the accounts of county councils and their committees in accordance with the provisions of the Local Government Act, 1871, sects. 11 to 18, and the Local Government Act, 1872, sect. 6. This must cover the committees of lunatic asylums, because, if it does not, there is no existing provision for the audit of their accounts, and, therefore, there is a direct application to such audit of sect. 6 of the Local Government Act, 1872, which provides for an apportionment of the salary of the auditor to the asylum, just as it was made before the Local Government Act, 1898.

Some authorities were cited by counsel on both sides, but none of them has any direct bearing on the question at issue, and, however valuable they may be for other purposes, I was not able to derive any assistance from them in coming to a conclusion in the present case.

I will give judgment for the plaintiffs in the terms of the claim made, save that the order for payment must be limited to the sum of £40 for the year ending 31st March, 1917.

Solicitor for the Local Government Board: *J. Meredy.*

Solicitor for the defendants: *J. J. O'Shea.*

A. H. W.

GUNNING, DECEASED.

LITTLE *v.* THE GOVERNORS OF COUNTY DOWN INFIRMARY (1).

Ross J.
1918.
Jan. 30.
Feb. 5.

Executor—Negligence amounting to wilful default.

Testatrix left £150 to her cousin, "J. G., of Vancouver, B.C." J. G.'s sister having informed the executors that his address was "Portland, Oregon, U.S.A.," they despatched a banker's draft to J. G. to that address without further inquiry. The money having got into the hands of the wrong person:

Held, that the executors had not acted with that care that might reasonably be expected from a careful man in the prudent discharge of his own business; that they were consequently guilty of negligence amounting to wilful default; and that they must make good the loss out of their own pockets.

ORIGINATING SUMMONS for administration adjourned into Court.

The facts in the case material to the present report were as follows:—

By her will, dated 8th April, 1913, Esther Gunning bequeathed certain pecuniary legacies; amongst others, a legacy of £150 to her second cousin, John Gibson, of Vancouver, B.C. As to the residue of her estate, she directed the same to be paid to the Governors of the County Down Infirmary at Downpatrick. The testatrix died on the 19th September, 1915, and on 29th October probate was granted to her executors, Francis Little, William Rodgers, and Victor Wilson, the plaintiffs in these proceedings.

The executors ascertained that John Gibson had a sister, Mrs. Helen Woods, residing near Bangor, Co. Down, who was also a legatee under the will. At their request she supplied them with his address—"Portland, Oregon, U.S.A." On the 15th November, 1916, Mr. Wilson, one of the executors, bespoke a banker's draft in the ordinary form from the Belfast Banking Company, for the transmission of the legacy less duty and expenses, and gave a cheque to the bank for £134 5*s.*, the net

(1) Before Ross J.

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amount payable to the legatee. This draft was transmitted by the Portaferry branch of the Belfast Bank to Messrs. Bell & Co., solicitors, who were acting for the executors in the administration of the estate, with instructions to forward it to the legatee, John Gibson, at the address supplied by Mrs. Woods.

On 21st February the Messrs. Bell enclosed the said draft, which was crossed, in a letter, and sent the same by registered post, directed to Mr. John Gibson, Portland, Oregon, U.S.A. After the despatch of the draft the executors received from Ewart Gibson, a brother of the legatee, a more particular address of John Gibson, and at once forwarded the same to Messrs. Bell. On the 2nd of March, 1916, Messrs. Bell wrote a letter to John Gibson, addressed to him at 115 Failing Street, Portland, Oregon, U.S.A., informing him of the despatch of the draft and letter.

On 15th April, 1916, a letter was received by Messrs. Bell from John Gibson, dated 22nd March, in reply to their letter of 2nd March, stating that he had caused inquiries to be made at the General Post Office at Portland, and that the letter of 21st February, 1916, containing the draft, would be returned to sender, there being so many of the same name in Portland.

On the 20th April, 1916, Messrs. Bell requested the Belfast Bank to have payment of the draft stopped. In the month of July, 1916, it became clear that the draft had got into the possession of some person who had signed the name of John Gibson on it, and obtained payment of the draft on 15th March, 1916, from the American Express Company. The executors made a claim upon the bank, but the latter repudiated all liability.

Robert Harrison K.C. (with him *Megaw*), for the plaintiffs, the executors:—

The executors are not insurers; Mrs. Woods gave Gibson's ordinary address, and they were entitled to assume that it was sufficient. It is admitted that Gibson must be paid; but I submit that the bank is liable to pay him, and not the executors. [He referred to *The Capital and Counties Bank* v. *Gordon* (1).]

(1) [1903] A. C. 240.

Herbert Wilson K.C., for the defendants, the residuary legatees:—

In no circumstances will the defendants support an action against the bank at the expense of a small estate like this. An executor is a gratuitous bailee, and cannot be charged with loss of assets come to his hands, unless he has been guilty of wilful default: Ingpen on Executors (ed. 1908), p. 571; *Speight* v. *Gaunt* (1); *Whiteley* v. *Learoyd* (2). The executors did not take the care an ordinarily prudent man would have taken in the discharge of his own business. The American bank could have paid any man named John Gibson.

Megaw, in reply:—

The bank could have asked whether the identification was complete. The executors were entitled to rely on the information they got from Mrs. Woods. Even if wilful default has been established, it must be shown that it was the cause of the loss, i.e., the proximate cause; that it is the cause sine qua non is not enough: *Macmillan* v. *London Joint-Stock Bank, Ltd.* (3). But the real cause of the loss here is a stranger's forgery.

Cur. adv. vult.

Feb. 5.

Ross J.:—

[His Lordship having stated the facts, as above set out, proceeded as follows:—]

It is plain that the legacy must be paid to the legatee, John Gibson, and the question now arises as between the executors and the defendants, who are the residuary legatees, whether the executors are to bear the loss personally or not. The law on this subject is very well settled. Prior to the Judicature Act, at law an executor was liable for the loss of the testator's assets when once they came into his hands: *Cross* v. *Smith* (4). This rule was in conflict with the law of a Court of Equity. The principle is thus laid down by Lord Hardwicke:—"If a trustee is robbed, the robbery, properly proved, shall be a discharge, provided he keeps the goods as he would keep his own."

(1) 22 Ch. D. 727.
(2) 33 Ch. D. 347.
(3) [1917] 2 K. B. 439.
(4) 7 East, 246.

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This principle has always been acted on by Courts of Equity to the present time. Therefore the executor stands in the position of a gratuitous bailee, with respect to whom the law is, that he is not to be charged without some default in him: Williams on Executors, 10th ed., vol. ii, p. 1444. There being a conflict between the rules of equity and the rules of common law, since the Judicature Act, the rules of equity must prevail. Therefore, in all Courts the executor cannot be charged with the loss of the testator's assets without wilful default: *Job* v. *Job* (1). Gross negligence may amount to wilful default. It was always a rule of the Courts of Equity, and was recognized by statute 22 & 23 Vict. c. 35, that the burden of proof is upon the persons who seek to charge the executors with the loss of assets fraudulently abstracted: *Brier* v. *Evison* (2). The executor must be proved to have acted without ordinary prudence. In applying the test of what is ordinary prudence, we are not to require of the executor expert or special knowledge. There must be one standard for all: *Re Mackey* (3); and the standard is this: that the executor in managing the trust must take all those precautions which an ordinary prudent man in business would take in managing similar affairs of his own. It is allowed to him to employ proper agents. He is not bound to scrutinize with suspicion each step taken by such agents, or to deal with them as if they were dishonest; but he must not expose the trust funds to unreasonable or unnecessary risks. An ignorant, uneducated trustee cannot escape from liability by reason of his shortcomings. On the other hand, a highly educated man is not to be held to stricter accountability by reason of his superior training. Each must act up to the Court's standard of prudence. No more is required, and no less can be accepted. These are the well-settled principles applicable to the matter in question.

In this case the executors acted with the approval of an experienced bank manager—one of themselves—and a respectable firm of solicitors. This circumstance, though it is in their favour, is not enough to exonerate them. If the advice so obtained, when acted on, does not come up to the standard of prudence, the executor is liable for the resulting loss. Otherwise the Courts

(1) L. R. 6 Ch. D. 562. (2) L. R. 26 Ch. D. 238.
(3) [1911] 1 Ch. 300.

would be called upon to sanction delegation of trusts—a thing contrary to all principle: *Learoyd* v. *Whiteley* (1).

The law, as I have stated it, is, as I understand, not contested; and I now come to apply it to the matter in hand. Does the action of the executors in this case come up to the required standard of prudence? With great regret I am driven to the conclusion that it did not. The executors applied to the sister of the legatee for his address, and obtained it from her—"Portland, Oregon, U.S.A." I will assume in their favour that she informed them that this address was sufficient, and that she had received replies from him to letters forwarded to this address. None of the replies was produced. She had retained none of them; and I suspect that Mrs. Wood made a mistake in asserting that this vague address would find her brother.

The first thing that would strike the mind of the ordinary man of business is that the address was plainly and manifestly insufficient. If the executors had taken the trouble to make any inquiry about Portland, Oregon, U.S.A., if they had even looked at a map of the Western States, they would have discovered that Portland was a large and important city in which there might be many persons named John Gibson. They made no effort to obtain a more particular address from others, who might be able to supply it. Ewart Gibson, a legatee under the will, a brother of Mrs. Wood, had it in his possession and afterwards supplied it. They applied for and obtained a draft in the name of Mr. John Gibson, as if there was only one person of the name in America. If they had done what they ought to have done, and obtained the particular address from Ewart Gibson, they should in common prudence have written to that address and obtained a reply. The signature to the reply could have been verified by Mrs. Wood and Mr. Ewart Gibson. I cannot but think that to send off the draft immediately without taking any further precautions such as an ordinary man of business would take was a very rash proceeding. Was there any necessity for such hot haste? None whatever. They were not informed that the legatee was in urgent need of the money. They had nothing to warrant them in thinking that the American bank would be bound to refuse payment unless the

(1) 12 A. C. 727.

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payee was identified as the legatee. They dealt with this substantial draft with less care than might be expected from the sender of a letter or a newspaper. The chances were fifty to one against the legatee's receiving the draft, and once it got into a stranger's hand, loss might be expected. They appear to have begun to realize the risk to which they had exposed the money, when they wrote to the legatee through Messrs. Bell to the particular address on the 2nd March; but it was then too late to avoid the disaster.

The only thing that remains to be considered is whether the loss was the natural result of the executors' carelessness. I think it plainly was, and nothing else could have been reasonably expected. Through their impulsive and mistaken action they put it in the power of a stranger in Portland to appropriate the money. The loss was the natural and probable result of their failure to take proper precautions. I must therefore declare that the executors are liable and must make good the loss out of their own moneys. I arrive at this conclusion with great regret, because I am sure the plaintiffs are honourable gentlemen and anxious to perform their duties properly and with expedition. There is not the smallest stain upon them in connexion with the matter. Sometimes even the best business men act impulsively and without proper inquiry, and loss results, as happened here. Though every Court is anxious to protect honest trustees from loss in the execution of a duty for which they get much blame and little gratitude, still there is a line beyond which leniency must not pass. Carelessness and laxity are not to be tolerated. The executor when he assumes the duty must know that if he is not careful to act up to the Court's standard of prudence, he will be obliged to bear the loss himself.

As this is the only matter in question, there is no necessity for a decree, and I accordingly dismiss the originating summons with costs.

Solicitors for the plaintiffs: *Bell & Co.*

Solicitors for the defendants: *J. Murland & Co.*

T. C. T.

RE ELIZABETH LOUGHHEAD, DECEASED. HAMILTON *v.* LOUGHHEAD.

(1917. No. 1886.)

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Annuity charged on real estate—Estate tail by implication—Wills Act, s. 29—Implication of cross-remainders—Proviso for ultimate merger "failing such issue"—Issue taking as purchasers—Issue read as heirs of the body—Course of descent—Reference to ancestor—Accrued shares—Estate tail in annuity barred—Subsequent duration—Base fee—Power of appointment to issue—Validity of exercise of.

E. L. by her will devised and bequeathed her property, real and personal, to trustees upon trust to pay to each of her sons, J., A., R., and H., as they should attain the age of twenty-one years, or to such of them as should be living at her death, or if dead to their lawful heirs, an annuity of £15 each, and to each of her daughters, M., J., E., and F., as they should attain the age of twenty-one years, or to such of them as might be living at the time of her death, or, if dead, then to their lawful heirs, an annuity of £35 during their natural lives respectively, and to their lawful heirs after their death. She directed that in case any of her sons should die without lawful issue or failing such issue the annuities of such of her sons so dying should go and be divided in equal shares amongst their then surviving brothers and their lawful issue and the lawful issue of any other of her said sons previously deceased; and in case any of her said daughters should die without lawful issue or failing such issue, that the annuities of such of her daughters so dying should go and be divided in equal shares amongst their then surviving sisters and their lawful issue and the lawful issue of any other of her said daughters then previously deceased. In the event of the death of all of her said sons and daughters without lawful issue or failing such issue she directed that the annuities should cease and become merged in the lands. The will also contained a prohibition against alienation of the annuities and a provision for forfeiture in that event.

The testatrix directed her trustee to permit her eldest son J., his heirs and assigns, to receive the rents and profits of the lands during his life subject to the annuities, and after the termination of that estate upon trust for his lawful issue as he should by deed or will appoint, and in default of appointment, amongst such issue in equal shares, and in case of his death without issue or failing such issue, to her other sons in succession subject to like limitations.

R. and A. predeceased J. and H., and died unmarried, and their annuities were paid in moieties to J. and H. J. executed a disentailing deed barring the estate tail he was considered to have in the annuities.

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J. by his will left all his property which he should die seised or possessed of and which he was competent to dispose of or over which he had a disposing power upon trust to pay the rents and profits of his real estate to his wife during her life, and after her death to divide the same amongst his four children in equal shares, and give power to his trustee after the death of his wife to sell the real estate for purpose of division.

J. died in 1900, leaving issue the four children named in the will, and grandchildren. H. died in 1916 unmarried. Two of the daughters, J. and E., died without issue. M. and F. died leaving issue, and the annuities of J. and E. were paid to them. The issue of M. failed. F. had issue living one child, J. P.

An originating summons was taken out by the trustees of the will of E. L. to determine who was entitled to the annuities and the lands.

Held, 1. That notwithstanding sect. 29 of the Wills Act, each of the sons of the testatrix took an estate tail by implication in the annuity given to him by the will.

2. That on the death of a son without issue his annuity went to his surviving brother in tail and to the heir of the body of a predeceased brother in tail in equal shares, issue being construed as heirs of the body.

3. That the accrued shares of the annuities went over in the same way as the original annuities, cross remainders in tail being implied, and that on the death of H. his annuities, original and accrued, went to the heirs of the body of J.

4. That the annuities of the daughters were given in the same way in tail with cross remainders in tail; and that all their annuities went by the implied limitation of cross remainders to J. P.

5. That as the annuities were rent-charges created de novo in tail, the effect of a disentailing assurance was only to give a base fee, and that the annuities were not perpetual, and would only last as long as there was issue capable of inheriting them.

6. That the word "issue" in the devise of the lands to the eldest son for life and after his death to his issue was to be read as a word of purchase, and that he took a life estate only in the lands with remainder in fee to his issue as purchasers in equal shares in default of appointment.

7. That the will of the eldest son was a valid exercise of the power of appointment created by the will of the testatrix.

The rule in *Mandeville's Case*, Co. Litt. 26 *b*, as explained in *Vernon* v. *Wright*, 7 H. L. C. 35, applied.

ADJOURNED SUMMONS.

The following statement is taken from the judgment of O'CONNOR M.R.:—

In this matter several questions arise under the will of Elizabeth Loughhead, dated the 31st May, 1845, and proved on the 5th December, 1845. The testatrix devised and bequeathed

all her property real and personal to trustees upon trust to pay to each of her sons, James, Archibald, Robert, and Henry, as they should respectively attain the age of twenty-one years or to such of them as might be living at the time of her decease or if dead then to their lawful heirs, one annuity of £45 sterling each, and to each of her daughters, Mary, Jane, Elizabeth, and Frances, as they should respectively attain the age of twenty-one years or to such of them as might be living at the time of her decease or if dead then to her lawful heirs, an annuity of £35 during their natural lives respectively and to their lawful heirs after their decease.

Later on the will provided that in case any of the sons should die without lawful issue or failing such issue, the annuities of such of her sons so dying should go and be divided in equal shares amongst their then surviving brothers and their lawful issue and the lawful issue of any other of the testatrix's said sons previously deceased; and that in case any of her said daughters should die without lawful issue or failing such issue then she directed that the annuities of such of her said daughters so dying should go and be divided in equal shares amongst their then surviving sisters and their lawful issue and the lawful issue of any other of her said daughters then previously deceased. The will then gave the annuitants powers of distress in the event of the annuities being allowed to go into arrear, and provided that in the event of the death of all of her said sons and daughters without lawful issue or failing such issue the annuities should cease and become merged in the lands.

The testatrix directed that none of her children whether sons or daughters or their heirs should have power to sell alien charge mortgage, or otherwise part with any of the said annuities, and in case of any of them so selling mortgaging charging or anywise parting with the same that then and in any such case the said annuity or annuities of such of her children so doing should become forfeited and be paid to and amongst their then surviving brothers and sisters and to the issue of such as were deceased.

The plaintiffs in the matter are the present trustees of the will, and all persons interested thereunder are before the Court.

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The four sons of the testatrix survived her. They are all now dead. Robert died in 1870, unmarried, leaving James, Archibald, and Henry surviving; Archibald died in 1883, unmarried, leaving James and Henry surviving; James died in 1900, leaving issue, many of whom are alive; Henry, the last surviving son, died on the 28th August, 1916, unmarried.

The following additional facts were given in evidence:—James Loughhead had ten children; four survived him, namely, Robert Henry, James Hannah, Elizabeth, now Elizabeth Foale, and Frances Mary, now Frances Illman. James's eldest son, John Knox Loughhead, predeceased him, and left six children, the eldest of whom was Alfred Ernest Loughhead. James Loughhead barred the estate tail in the annuities which he was considered to have under the will of the testatrix, Elizabeth Loughhead, and left all his property to a trustee in trust for his wife for life, and after her death in trust for his four surviving children already mentioned, in equal shares. Robert Henry died in 1908 without issue, having left all his property to his wife, Isabella Loughhead.

As regards the daughters of the testatrix, Jane Loughhead married James Davidson, and died in 1867 without issue. Elizabeth Loughhead died unmarried in 1848; Mary Loughhead married William Kennedy, and died in 1881, leaving one child, Elizabeth Kennedy, who died in 1914. Elizabeth Kennedy was three times married, first to Charles Furness, by whom she had one child only, Charles Stuart M'Kenzie Furness, who died in 1914 a bachelor and intestate; secondly to William John Tait, by whom she had one child, James Tait, who died in 1917, unmarried, having by will left everything he had or might become possessed of to Amie Kirtlie; thirdly to Arthur Bowcock, by whom she had no children. Frances Loughhead married Reverend Hugh M'Curdy Hamilton, and died in 1908, having had one child, Jane Brown Hamilton, now Jane Peden.

The personal estate of the testatrix was many years ago fully administered, and the residuary estate subject to the trusts of the will consisted of the lands of Garryduff and premises in the town of Ballymoney in the county of Antrim. The rents of the lands which were let to tenants had been insufficient to pay the annuities in full. The parties interested in the lands and annuities were

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desirous to have their rights determined by the Court with a view to a sale of the lands under the Land Purchase Acts; accordingly this summons was taken out by Hugh M'Curdy Hamilton and Alexander Peden, who had been appointed new trustees of the will.

The questions raised by the summons are indicated in the arguments and the judgments.

Megaw, for the plaintiffs.

Feb. 1, 6.

J. S. Baxter, for the defendant, Isabella Loughhead, widow and residuary legatee of R. H. Loughhead:—

Anything which R. H. Loughhead got through his father, James Loughhead, would come to her. R. H. Loughhead was the eldest surviving son of James Loughhead, and one of the devisees in his will. James was entitled in three capacities: 1, to an original annuity; 2, to a moiety of the annuities which accrued on the deaths of Robert and Archibald without issue; and, 3, to an interest in the lands subject to the annuities. The heir-at-law of James was the defendant A. E. Loughhead, the eldest son of John Knox Loughhead, the eldest son of James, who predeceased him.

The will dealt with three subject-matters: 1, sons' annuities; 2, daughters' annuities; and, 3, the lands subject thereto. As regards 1 and 2, there are clauses of accruer within each class, but not cross clauses of accruer from sons to daughters. The testatrix uses different words in the initial gifts to the sons and daughters. To each son she gives a "yearly sum" of £45, without any words of limitation; but when she comes to deal with the daughters she describes the annuities differently. She gives an "annuity yearly sum or clear annual rentcharge," and adds words of limitation, namely, "during the term of their natural lives, and to their lawful heirs after their decease." If the will stopped there you could have life annuities given to the sons, and perpetual annuities to the daughters, but the subsequent terms of the will show that it was intended that the sons should take more than a life interest. *Warren* v. *Wright* (1) is an authority, if any is needed, on this point.

(1) 12 Ir. Ch. 401.

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The first question is as to the original annuities to the sons. Did they take estates tail or estates in fee with executory gifts over? It is submitted that they took estates tail. Sect. 29 of the Wills Act has to be got over; but it must yield to a contrary intention if that is to be found in the will. There are four indications of such contrary intention: 1, the words in the gift over, "or failing such issue"; 2, the clause by which the testatrix attempts to prohibit alienation; 3, the difference in the terms of the original gifts to the sons and daughters, respectively; and, 4, the provision for merger of the annuities in the event of the deaths of all the sons and daughters without issue or failing such issue.

[He referred to *Magee* v. *Martin* (1), and the judgment of Walker L.J.; *Crumpe* v. *Crumpe* (2); Hawkins on Wills (last ed., p. 216).]

Robert Henry Loughhead was entitled under the will of James Loughhead to one-fourth of his original annuity, and one-fourth of the moieties of the annuities of Robert and Archibald, which accrued to James. It is uncertain who was entitled on the death of Henry William without issue to his annuities and the moieties of the annuities of Robert and Archibald, which accrued to him; but this defendant does not seem to be interested in these. There was no surviving brother. There is a gift over to the lawful issue of any son previously deceased. If that takes effect, it is to the issue of James living at the death of Henry William. Robert Henry Loughhead could not claim a share, as he died before Henry William. The effect of the disentailing deed was to give James a base fee in the annuities, which he could dispose of by his will. His annuities would not merge in the lands unless he took an absolute interest; nor would merger be beneficial to him, as the other annuities would be outstanding, and the annual income of the lands was insufficient to pay all annuities in full. James's will was a valid exercise of the power of appointment to his issue, even though he purported to give the lands to a trustee for his wife for life. That will indicated a general intention to execute any power of appointment which James had.

(1) [1902] 1 I. R. 367. (2) [1900] A. C. 127.

Ellison, for the defendants, James H. Loughhead, Elizabeth Foale, and F. W. Illman, the surviving children of James Loughhead:—

The gift over in the event of any of the testatrix's sons dying without issue, or failing such issue, only applied to the original annuities, and not to the accrued shares. The surviving brothers took estates tail in the shares which accrued to them. The remainder expectant on the determination of those estates tail passed under the residuary devise to James Loughhead, and passed under his will to James H. Loughhead, Elizabeth Foale, Francis Illman, and Robert H. Loughhead. By the disentailing deed James Loughhead acquired a base fee in his own original share and in the share of Robert Loughhead's annuity and Archibald Loughhead's annuity, which had accrued to him, and this estate also passed under his will to James H. Loughhead, Elizabeth Foale, Frances Mary Illman, and Robert H. Loughhead.

J. M. Whitaker for the defendants, A. E. Loughhead and Jane Peden:—

A. E. Loughhead is the eldest son of John Knox Loughhead, who was the eldest son of James Loughhead, and predeceased his father. He is a great-grandson of the testatrix and her heir-at-law. He is a grandson and heir-at-law of James Loughhead, and is also heir of the body of James Loughhead and of the testatrix. He is one of the descendants or issue of James. He makes no claim as heir-at-law of the testatrix, nor as heir-at-law of James in respect of James's original annuities, or of the annuities which accrued to him in his lifetime. James, by his disentailing deed, barred the estate tail in the annuities original and accrued and disposed of them and any greater estate he had away from his heir-at-law. But, as heir of the body of James, A. E. Loughhead became entitled to an estate tail in the original annuity of Henry William and also in the shares which accrued to Henry William of the annuities of Robert and Archibald.

Henry William died in 1916, unmarried. He left no brother surviving, so that the gift over to a brother could not take effect, and the Court has to consider the effect of the words, "and to the lawful issue of a deceased brother." James was the only son who had issue, many of whom are still living. A contrary intention

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within the meaning of sect. 29 of the Wills Act is shown for the reasons already given on behalf of Isabella Loughhead. *Dawson* v. *Small* (1) is an illustration; see the judgment of James L.J., at p. 652. If it is an estate tail, it is because "issue" is to be construed as heirs of the body. Issue may mean descendants, not heirs of the body; but if so, there would not be an estate tail. The issue here take not concurrently but severally and successively. The testatrix did not mean that father and child should take concurrently.

A. E. Loughhead as heir of the body of James takes as purchaser, but on his death the estate descends as if it was the estate tail of James, and on failure of issue of A. E. Loughhead would go to the next heir of the body of James. The stirps is moved back to the ancestor, who is to be deemed the first taker for the purpose of delineating the course of descent. This is established by *Manderville's Case*, as explained in Fearne on Contingent Remainders, p. 80, and also in Theobald on Wills, 6th ed., p. 324. It was followed in *Wright* v. *Vernon* (3). The words there were similar to those in *Manderville's Case* (2). [He referred to the opinion of Lord Cranworth in the House of Lords in *Wright* v. *Vernon* (3), at p. 60.] *Whitelock* v. *Heddon* (4) shows the application of *Manderville's Case* (2) to the present, and is an authority that "issue" may be construed as heirs of the body.

2. As regards the accrued shares, cross remainders should be implied: *Re Hudson* (5); *Hannaford* v. *Hannaford* (6).

The intention of the testatrix was that the accrued shares should go over in the same way as the original annuities.

As regards the annuities to the daughters, the same arguments apply. The only difference is, that they were given during their lives; but the daughters took estates tail notwithstanding: *Macnamara* v. *Dillon* (7); *Robinson* v. *Robinson* (8). The annuities of Elizabeth and Jane went over to Mary and Frances. The issue of Mary has failed by the death of her sole grandchild, James Tait, and Jane Peden is entitled to the four annuities.

(1) L. R. 9 Ch. 651.
(2) Co. Litt. 26 *b*.
(3) 2 Drew, 439; 7 H. L. C. 35.
(4) 1 B. & P. 243.
(5) 20 Ch. D. 406.
(6) L. R. 7 Q. B. 116.
(7) 11 L. R. Ir. 29.
(8) 2 Ves. Sen. 225.

E. S. Murphy for the defendant Amie Kirtlie, the devisee of James Tait:—

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He was grandson and heir-at-law of Mary Kennedy, and died in 1917. I submit that the daughters took estates in fee with executory limitations over, not estates tail.

James Tait would have taken Mary Kennedy's annuity and a moiety of the annuities of Jane and Elizabeth. The words "during the term of their natural lives and to their lawful heirs after their decease" would, if there was nothing more, create estates in fee simple. It is sought to cut them down by the later words, "in case any of my daughters shall die without lawful issue, or failing such issue, the annuities of such of my daughters so dying to go amongst their surviving sisters." But "die without issue" here means without issue living at the death; and if the original annuity of Mary Kennedy was given in fee, it was given with an executory gift over in an event which did not happen, as she left issue.

The words "failing such issue" may mean having had issue who died in the lifetime of the annuitant. If those words can have that meaning, that is not evidence of a contrary intention within sect. 29 of the Wills Act. The words "so dying" mean dying without issue at that time. The trusts of the lands in favour of the eldest son and his brothers in succession contain the same words, "in case of his decease without issue, or failing such issue." The testatrix intended that the devolution of the estate should depend, not on the indefinite failure of issue, but on failure of issue at the death; and that view strengthens the view put forward as to the same words earlier in the will. He referred to Jarman on Wills (1881 edition), pp. 518, 519, and *Parker* v. *Birks* (1), and also to *Coltsmann* v. *Coltsmann* (2), and *Van Grutten* v. *Foxwell* (3).

Therefore I submit that James Tait took Mary Kennedy's annuity, and that it passed under his will to Amie Kirtlie.

It would be a strained construction to hold that estates tail were created in the accrued shares.

(1) K. & J. 166. (2) L. R. 3 H. L. 121. (3) [1897] A. C. 658.

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O'CONNOR M.R., having stated the will and the facts above-mentioned, proceeded as follows:—

The first question is, who are now entitled to the annuities given to testatrix's sons, and for what estates and interests? This depends upon the estate given by the will in each annuity. Was it only an estate for life, followed by other estates for life? Or was it an estate tail? Or was it an estate in fee with an executory gift over?

Before dealing with these questions, I wish in the first place to say that I treat the annuities as rent-charges charged on real estate and not as mere personal annuities. They are clearly rent charges charged on the lands, and the annuitants are given powers of entry and distress over the lands. The testatrix could, therefore, have given estates tail or estates in fee in the annuities.

It is well settled that the creation by will of a rent-charge de novo without any words of limitation is prima facie only for the life of the devisee, but it is equally well settled that this must yield to the intention of the testator, which is to be gathered from the entire will. Reading the will one thing seems absolutely certain, and that is that the annuities to the sons were to continue so long as there remained in existence any issue of any of the testatrix's sons. This is absolutely inconsistent with life estates only in the first takers, to be followed by life estates in the next takers. Life estates, therefore, may be put out of the question. There remains the more arguable question whether the annuitants were made tenants in tail, or tenants in fee with executory gifts over.

The annuities to the sons are given in the first instance indefinitely, that is without any words of limitation. Later on in the will there is this clause—"In case any of my said sons shall die without lawful issue or failing such issue then I direct the annuity or annuities of such of my said sons so dying to go and be divided in equal shares amongst their then surviving brothers and their lawful issue, and the lawful issue of any other of my said sons previously deceased." It is said that "without lawful issue or failing such issue" must be construed as meaning a failure of issue at death under the 29th section of the Wills Act. But this rule of construction yields to intention, and I think that the words in this will "or failing such issue" must mean something

different from the first alternative "die without issue." It seems to me to provide for the event of there being issue, and that issue subsequently failing; and this construction is amply borne out by the clause which provides for the ultimate merger of the annuities in the lands on the death of all her sons without lawful issue, or on the failure of such issue. This, undoubtedly, means the failure of issue at an indefinite future time.

If confirmation were wanted for this construction, I think that it is to be found in the clause which attempts to prevent a sale, alienation, mortgage, or charge of the annuities. This is, of course, invalid, but it indicates an intention that the annuities should be allowed to go without interruption to the issue in the manner of an estate tail, and I find that a similar clause was relied upon by Walker C. in *Magee* v. *Martin* (1) as supporting the construction which gave an estate tail in the will which he had in that case under consideration. I, therefore, hold that each of the sons of the testatrix took an estate tail by implication in the annuity given to him by the will.

The next point for consideration is, Is the estate given on failure of the estate tail? In the language of the will it is to go to the surviving brothers of the annuitant whose issue has failed and their lawful issue and the lawful issue of any brother who had previously deceased. Now I do not think that in the case of surviving brothers any construction can reasonably be given except that which gives them estates tail in remainder. "Lawful issue" of such brothers must be construed as words of limitation. If they are words of purchase, the result would be the division of an annuity between the stirps and all the issue of that stirps in equal shares, instead of a descendible annuity which is plainly pointed at by the entire will. I am, therefore, of opinion that the gift in remainder to the surviving brothers and their lawful issue is a gift to them in tail. But in addition to the gift to surviving brothers and their issue there is the gift to "the lawful issue of any other of my said sons previously deceased." Do the lawful issue of such sons take as purchasers? If so, is the class of issue to be confined to children of deceased brothers? or is it to be extended to grandchildren and even remoter issue? Are they to

(1) [1902] 1 I. R. 367.

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take per stirpes with the surviving brothers, or per capita? Once the issue of deceased brothers are let in as purchasers simpliciter these questions arise, and no matter how they are solved the annuities are liable to devolve in a way which was never contemplated by the testatrix. It is quite evident that what she wanted to provide for in the gift over was that the devolution of the annuities was not to be affected by the previous death of a brother leaving issue, and that the share which would have gone to him had he survived should devolve just as if he had survived. This share, had he survived, would have gone to the heir of his body if he had had one. It was the wish of the testatrix to make the devolution independent of the contingency of survivorship, and that the estate, the subject of the gift over, should take the same course of succession as it would have taken if all the other brothers had survived him on whose death the estate was to pass. This construction would give an estate in tail to the heir of the body of the pre-deceased brother in the share of the annuity which would have gone to him in tail had he survived. There is the highest authority for this construction.

Mr. Whitaker, in his able argument, relied on *Mandeville's Case* (1), which takes a leading place in the text-books. John de Mandeville died, leaving issue by Roberge, his wife, two children, Robert and Maude. A gave certain lands to Roberge and to the heirs of her late husband, John de Mandeville, on her body begotten. It was adjudged that Roberge had only an estate for life and the fee tail vested in Robert (heir of the body of his father by her), and that when he died without issue his sister Maude (a child of his father's and mother's bodies) became tenant in tail per formam doni. Here it will be observed that on the decease without issue of the tenant in tail by purchase a remainder in tail was given to his sister, although the gift was in terms only given to the heirs of their father's body by his wife their common mother, and the sister was not his heir at his death. The explanation of this decision is very clearly given in the judgment of Mr. Justice Coleridge in *Vernon* v. *Wright* (2). There the devise was "to the right heirs of my grandfather, Sir Thomas Samwell, Bart., deceased, Mary by his second wife for ever."

(1) Co. Litt. 26*b*.

(2) 7 H. L. C. 35.

The case came before Kindersly V.-C. (1) in the first instance, and he held that the devise gave an estate tail. An appeal was taken to the House of Lords, and the common law judges were summoned for the hearing. The Vice-Chancellor's judgment was affirmed. The arguments turned, to a large extent, on *Manderville's Case* (2), which was thus expounded by Coleridge J.: —"Laying out of consideration for a moment the words 'for ever,' found in the present case, and not found in *Manderville's Case* (2), there seems no distinction between the two. In the one the gift is 'to the right heirs of my grandfather, Sir Thomas Samwell, deceased (the father of my late uncle, Sir Thomas Samwell, by Mary, his second wife, deceased')'; in the other 'to the heirs of John de Mandeville, late husband of Roberge, on her body begotten.' There is no gift to the grandfather in the one case or to John de Mandeville in the other; but the words in each case describe a special heir who takes by purchase. In this case, says Mr. Fearne in his book on Contingent Remainders (p. 80, 9th edition), they appear to have 'a sort of equivocal or mixed effect'; for though they give the estate to the special heir originally and not through or from his ancestor, yet the estate which he has so taken has such a reference to the ancestor as to pursue the same course of succession in the same extent of duration or continuance through the same persons as if it had attached in and descended from the ancestor. And Mr. Jarman (vol. ii, p. 2, ed. 1843) says that in the case of such a devise 'the estate will devolve to all persons who successively answer the description of heir of the body'; and whatever technical difficulties there are in the way of thus holding, which *Manderville's Case* (2) strongly illustrates, it seems obvious that in this way alone the intention of the grant or devise can be effectuated. In such a grant or devise there can be no doubt that the intent was that all the heirs of the body should in succession take; in *Manderville's Case* (2) that both John and Maud should take, the latter in case the former should die without issue or the issue should fail; in the present case that not merely the right heir, when the limitations over should take effect, but all right heirs answering the description in succession, if the first should die without issue or the issue fail. But if it can be held that the whole force of the

(1) 2 Drewry, 439. (2) Co. Litt. 26*b*.

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gift or devise be spent when any one right heir has taken, because he takes by purchase, that intent will obviously in numberless cases be defeated."

Now apply that to the case we are dealing with. The gift over was made to the issue of a predeceased brother only because he had predeceased, and in order to prevent any change in the course of devolution consequent on the previous death of a brother leaving issue. Is there not here, in the language of the learned author of Contingent Remainders, "such a reference to the ancestor as to pursue the same course of succession in the same extent of duration or continuance through the same persons as if it had attached in and descended from the ancestor"?

If the gift over were to the heirs of the body of a predeceased brother the case would be on all fours with *Vernon* v. *Wright* (1); but "issue" is to be construed as heirs of the body: *Whitelock* v. *Heddon* (2). All this leads me to the conclusion that on the death of a son of the testatrix without issue, his annuity went over to his surviving brothers in tail, and to the heir of the body of a predeceased brother in tail. But then there remains the question, What becomes of the accrued shares of annuities? Do they go over in the same way as original shares? or do they simply go over in tail without any further remainder? If the latter question is to be answered in the affirmative, then certain of the accrued shares of the annuities might determine, notwithstanding that issue still remained of some of the sons, and this would violate the intention of the testatrix as manifested by the merger clause which provided for the cesser of the annuities on the death of all her sons without lawful issue or failing such issue. The testatrix intended that all the annuities should continue so long as there should be any issue of any of her sons. She failed to declare in express language the limitations which would have carried out her intention. This would have been properly done by cross-remainders in tail. The cross-remainders are absent; but they may be implied for the purpose of carrying out the intention of the will: *Vanderplank* v. *King* (3); *Hudson* v. *Hudson* (4); *Taaffe* v. *Conmee* (5); *Hannaford* v. *Hannaford* (6). It

(1) 7 H. L. C. 35.
(2) 1 B. & P. 243.
(3) 3 Hare, 1.
(4) 20 Ch. Div. 406.
(5) 10 H. L. C. 64.
(6) L. R. 7 Q. B. 116.

will be sufficient if I only make special reference to one of those authorities. *Tuaffe* v. *Conmee* (1) was an appeal from the Irish Court, and Lord Cranworth, in the House of Lords, thus states the rule of construction (p. 81):—"I take it that the doctrine is now well established, that whether cross-remainders are to be implied or not is a mere question of construction upon the whole face of the will; and wherever there are limitations in tail, or in tail male, and in default of such issue a gift over, then I take it the presumption is that that means in default of the issue of all of them." The present case has exactly the element in express declaration, which, according to Lord Cranworth, necessarily implies cross-remainders, viz., a final gift in default of issue of all the sons.

But it may be said, and so far as I know with accuracy, that cross-remainders have only been implied in the cases of tenants in common of the same lands, and that there is not the same reason for the implication when each original devisee is the sole owner of a separate estate—such as an annuity—settled on him and his issue. It may be said that in such a case there may be good ground for implying cross-remainders between the issue of each ancestor, but not for the further implication of the wider cross-remainders, which would operate as between the issue of the several ancestors. But this is only a question as to the scope of the intention; and in the present case the final provision for the merger of all the annuities on failure of the issue of all the ancestors seems to involve cross-remainders as between the issue of all.

Having arrived at these conclusions as to the meaning of the limitations of the son's annuities, it remains to be seen how, on the special facts, the annuities devolved. The testatrix's son Robert died in 1870, without issue, and without having barred his estate tail. His annuity went over to his three surviving brothers—James, Archibald, and Henry—as tenants in common in tail, in equal shares. Archibald died in 1883, without issue, and without having barred his estate tail, and his original annuity, and accrued share of Robert's annuity, went to his two brothers—James and Henry—as tenants in common in tail. This left in effect two increased annuities of £90 each in James

(1) 10 H. L. C. 64.

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and Henry. James barred his estate tail in his original annuity and his annuities which had thus accrued, and devised them by his will to his son Robert Henry (whose estate has devolved on his widow, Isabella Loughhead), his daughter Elizabeth (now Elizabeth Foale), his son James Hannah, and his daughter Frances Mary (now Illman), in equal shares.

We now come to the annuity devised to the testatrix's son Henry, and to the shares which accrued to him from his brothers, Archibald and Robert. These were held by him in tail, and, as we have seen, subject to cross-remainders. He was the last survivor, and died without issue, and, as James was the only one of the sons of the testatrix who had issue, we find that the annuity has devolved on his heir-at-law, viz., his grandson, Albert Ernest Loughhead, who is now the owner in tail of annuities amounting to £90 per annum.

This disposes of the sons' annuities, and we have now to deal with the annuities of £35 each given to the testatrix's four daughters—Mary, Jane, Elizabeth, and Frances. For the same reasons which brought me to the conclusion that the annuities to the sons were limited to them in tail, with cross-remainders between them, I am of opinion that estates tail, with cross-remainders, were given to the daughters. There are some differences in language, but they are unimportant, and they do not require notice. The daughters' annuities devolved in this way. Two of them—Jane and Elizabeth—died without issue. The other two—Mary and Frances—died leaving issue. The issue of Mary has failed by the death of her sole grandchild, James Tait, without issue. Frances has issue living, one child, Jane Peden, who is her heiress-at-law, and she has become entitled by the implied limitations of cross-remainders to the four annuities of £35 each in tail.

Before leaving this part of the case I wish to say that, in arriving at the conclusion that all the daughters' annuities devolved on Jane Peden, I did not overlook the argument of Mr. Murphy, who, on behalf of Amie Kirtlie, the devisee and legatee of James Tait, the grandson and heir-at-law of the annuitant Mary Henry Loughhead, claimed to be entitled to her original annuity, and to a moiety of Jane's annuity, and a moiety of Elizabeth's annuity. This would have been the result if the

annuities had been given in fee, with executory gifts over in default of issue living on the deaths of the annuitants. As against this view I have again to refer to the merger clause in the will, which, to my mind, points clearly to an indefinite failure of issue. If I am right in this, *Parker* v. *Birks* (1) and *Coltsmann* v. *Coltsmann* (2), relied on by Mr. Murphy, do not apply.

Having come to the conclusion that the several annuities were given in tail, there remains to be considered what is the duration of the annuities. The estates tail in one and in parts of others have been barred. Does that make them perpetual? This question does not present any difficulty. If a rent-charge in fee has been previously created, and afterwards settled in tail, the estate tail may be barred, and thereby enlarged into a fee. But if a rent charge is granted de novo in tail, the tenant in tail, by a disentailing assurance, cannot give more than a base fee. The annuities we are dealing with, therefore, are not perpetual annuities. They will last only so long as there is issue who would be capable of inheriting them under the limitations in the will, so that the sons' annuities will last so long as there is issue of the sons or any of them, and the daughters' annuities so long as there is issue of them or any of them.

I come now to the devise of the lands which were charged with the annuities. The testatrix directed her trustees to permit and suffer her eldest son and heir-at-law, James Loughhead, his heirs and assigns, to receive, possess, and enjoy the lands, rents, and profits during the term of his natural life, subject nevertheless to the said annuities which she charged thereon, and after termination of that estate then upon trust for the lawful issue of his said son James, as he should by deed or will appoint, and in default of appointment amongst such issue in equal shares, and in case of his decease without issue or failing such issue, to the testatrix's other sons in succession, subject to like limitations. The first part of the devise would, if taken by itself, give an estate in fee, but that estate is clearly cut down to a life estate unless "issue" is to be read as a word of limitation and not of purchase. I am bound to construe it here as a word of purchase first by reason of the power of appointment among the issue, and, secondly, by the gift in default of appointment among the issue in equal shares as tenants

(1) 1 K. & J. 156, at p. 160. (2) L. R. 3 H. L. 121.

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in common, each of these gifts being inconsistent with the construction which would make "issue" a word of limitation.

James, by his will dated the 19th January, 1900, devised and bequeathed all his real and personal estate of which he should die seised or possessed, and which he was competent to dispose of, or over which he had any disposing power, to Wm. Knox upon trust to pay the rents and profits of his real estate to his wife during his life, and after his death to divide same among his four children, Robert Henry Loughhead, James Hannah Loughhead, Elizabeth Foale, and Frances Mary Loughhead, in equal shares, and the testator gave power to his trustee after the death of his wife to sell the real estate for the purpose of division.

The question on this will is whether the power of appointment was validly executed. I have no difficulty in saying that it was. The will was expressly made in exercise of any disposing power vested in the testator, so that there is a sufficient reference to the power of appointment to make the testamentary disposition a valid exercise of it. No doubt the appointment to the testator's wife for life failed, as an appointment to a stranger to the power, and during her life the property went as in default of appointment, but this did not affect the validity of the appointment to the children in remainder. Then, again, the appointment was made to a trustee for the children with a power of sale, and on the authorities this is a substantial exercise of the power and, therefore, valid. This, indeed, has not been disputed. The testator died in the year 1904. His widow died some years ago, and the children who are appointees are now equitable owners in possession in equal shares.

In result Isabella Loughhead (as the devisee of Robert Henry Loughhead), and Elizabeth Foale, James Hannah Loughhead, and Frances Mary Illman are now absolutely entitled in equal shares to the lands charged with the annuities.

This disposes of all the questions submitted for decision.

Solicitors for plaintiffs: *Greer & Hamilton.*

Solicitor for James Hannah Loughhead, Elizabeth Foale, and Frances Mary Illman: *James Quail.*

Solicitors for Isabella Loughhead: *Moorhead & Wood.*

Solicitor for A. E. Loughhead and Jane Peden: *J. H. Peden.*

Solicitor for Amie Kirtlie: *J. H. Peden.*

W. L.

TUGHAN *v.* CRAIG.

(1917. No. 973.)

Dodd J. (for Ch. Judge) 1918. Feb. 7.

Defamation—Libel—Words uttered in course of judicial proceedings—County Court Judge—Recorder—Privilege—Reasonable cause of action—Immunity from action.

An action does not lie against a judge of a Court of Record for anything done by him as a judge in a judicial proceeding. A county court judge or a recorder is within the privilege. The privilege is not for the individual, but for the sake of the public, and the advancement of justice. And if impleaded he should rely on his privilege. An added allegation of malice does not make the action maintainable. The privilege extends to words spoken as well as to things done. A Court of Equity has no jurisdiction to review what is done by a judge as judge.

On a motion to stay such an action on the ground that (*a*) the action is frivolous and vexatious, and (*b*) that it discloses no ground of complaint, the Court may decline to decide that it is frivolous and vexatious, and may make an order dismissing the action as if on demurrer.

MOTION that the action should be dismissed with costs, or that all further proceedings in the action should be stayed, on the ground that the statement of claim disclosed no cause of action, and that the action was frivolous and vexatious.

The plaintiff, Nathaniel Tughan, was a solicitor of the Supreme Court of Judicature, and had during the past twenty-one years been practising as such in Belfast and district.

The defendant was the Recorder of the city of Belfast.

By writ, dated the 18th November, 1917, the plaintiff claimed "a declaration that the defendant is not protected by judicial privilege in the utterance of slanderous words of and concerning the plaintiff, such slander being directed against plaintiff's professional procedure in defence of a prisoner under arraignment at a trial not then depending in Court, and in which, to the knowledge of the defendant, a verdict of acquittal had been previously recorded."

The 3rd paragraph of the statement of claim alleged that on the 25th October, 1917, the plaintiff, in his professional capacity

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as solicitor, appeared for the defence and on behalf of one William M'Kinstry, who was indicted before the defendant as Recorder and a jury of the city of Belfast on the charge that William M'Kinstry did receive and take into his possession a bicycle, the property of James Pyper, well knowing same to have been stolen. The jury acquitted the prisoner, and a verdict of "not guilty" was entered and recorded upon the Crown book.

The 4th paragraph of the statement of defence was as follows:—"On the 26th day of October, 1917, the defendant, in charging a jury in a subsequent case, namely, that of the King *v.* Henry Bryson and Thomas Craig, assailed the professional privilege of the plaintiff as solicitor in defending the said M'Kinstry, and departed from his judicial business and duty by entering upon and giving irrelevant, perverse, malicious, and slanderous description of plaintiff's professional methods on the previous day in the defendant's Court in said (M'Kinstry's) concluded case, with which the jurors then sworn had, as the defendant then well knew, no concern or duty."

The plaintiff then averred that the defendant, contrary to his duty to uphold and preserve the just privilege of plaintiff as a solicitor, perverted the plaintiff's words, and maligned his conduct, by saying of plaintiff, with insulting gestures, the words following, namely:—"He was addressing the jury in a case here last night, and he told them that he could twist black and make it white, and even, if he liked, he could twist white again and make it black. Now, people speak of the profession to which I belong with a good deal of blame that the men who practise it have no feeling of honesty or truth; and a statement like that, unblushingly made by a solicitor in open Court, before a judge and a jury, goes a long way to justify public opinion as regards some members of the profession. I suppose it was the vanity of the man who was not only brazen-faced enough to make a defence by twisting black into white and white into black, but was boasting how clever he was."

The statement of claim then alleged that after the said invasion of plaintiff's professional privilege the defendant refused him right of audience, and ordered the police to remove him out of Court if he attempted to vindicate himself. The

statement of claim also averred that the defendant before action abandoned his judicial privilege by engaging in newspaper controversy as to his proceedings as Recorder, and that he in any event exceeded his jurisdiction in assailing and attempting to destroy or diminish the plaintiff's professional privileges, and by language and conduct calculated to provoke a breach of the peace.

The plaintiff claimed—1, a declaration that the defendant was not protected by judicial privilege, and, 2, an injunction to restrain the defendant from hereafter repeating the said words, or similar words, or otherwise invading the plaintiff's professional privileges.

S. L. Brown K.C. (with him *D. M. Wilson K.C.* and *James Andrews*), for the defendant in support of the application :—

The ground on which we ask either to have this action dismissed, or that the statement of claim be struck out, is that in respect of words spoken by a judge in the course of a case which he has jurisdiction to try, no action of any kind, either at Common Law or in the Chancery Division, can be maintained or entertained. It will not be disputed that at Common Law no action is maintainable in such a case; but it will be urged that, though no action will lie at Common Law, an aggrieved party can come into the Chancery Division and obtain a declaration that on the occasion complained of, the learned judge was not protected by "judicial privilege," and an injunction restraining the repetition of the words or similar words in the future. Such a contention is wholly untenable, and involves a misconception of the principle on which what is miscalled "judicial privilege" is founded. No action will lie against a judge in respect of words spoken in the course of a judicial proceeding, not because of the privilege of the individual, but because of the right of the public, that a judge should not be made afraid. If I am right in this, then the distinction between an action of slander and an action for an injunction disappears, and the public have the same right to have a judge unfrightened by the terrors of a Chancery action as by the inconveniences of an action at Common Law. That the foundation of this so-called absolute privilege of a judge is the right of the public rather than

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the privilege of the individual is laid down in a judgment of Channell J. in *Bottomley* v. *Brougham* (1), which was afterwards adopted by the Court of Appeal in *Burr* v. *Smith* (2). The cases show that no action of any kind will lie against a judge for words spoken while doing his office. I refer also to the judgment of Brett M.R. in *Munster* v. *Lamb* (3), and see *Scott* v. *Stansfield* (4). The form of order in a case of this kind will be found in *Burr* v. *Smith* (5). See the form of application there set out, which was granted in the terms asked for. This question of law was decided 146 years ago in *Rex* v. *Skinner* (6), in which case Lord Mansfield says: "What Mr. Lucas has said is very just; neither party, witness, counsel, jury or judge, can be put to answer, civilly or criminally, for words spoken in office." It would be impossible that the authority of a judge could ever be supported were he liable at the suit of any person for words spoken by a judge as such. De fide et officio judicis non recipitur quaestio (Bac. Max., reg. 17.)

Serjeant Matheson K.C., *Healy K.C.*, and *T. W. Brown*, for plaintiff:—

This summary application ought not to be granted. There is a very serious question to be ultimately argued in this case, and it should not be choked in this summary way. The case in the end may be decided against the plaintiff, but it should be fully tried out. A judge has no privilege to be malicious, although he cannot be brought before a judge and jury and be sued for damages. As to the right of the Court to make an injunction, see *Hermann Loog* v. *Bean* (7).

The business of the plaintiff largely consists in defending prisoners, which cases necessarily come very largely before the Recorder of Belfast. The statement complained of had nothing whatever to do with the trial then proceeding before the Recorder, and was calculated to prejudice the trial of a prisoner who was being defended by the plaintiff. The statement was an injury to plaintiff, and wrong to the prisoner who was his client. It is said there is no remedy, but the Court has power in such case to grant an

(1) [1908] 1 K. B. 584.
(2) [1909] 2 K. B. 306.
(3) 11 Q. B. D. 588, at p. 602.
(4) L. R. 3 Ex. 220.
(5) [1909] 2 K. B., at p. 308.
(6) Loft's Reports, 55.
(7) 26 Ch. Div. 306.

injunction, and this is not a case where the principle that a judge is not to be put in fear can apply. What we want is an injunction to restrain him for the future. We have not framed our action for libel or slander. We seek no damages. We ask an injunction to prevent a recurrence. The facts as stated in the statement of claim must be assumed to be true. In *Munster* v. *Lamb* (1) the judge made every assumption against the defendant and in favour of the plaintiff; but he used the words "nevertheless, inasmuch as the words were uttered with reference to, and in the course of, the judicial inquiry which was going on, no action will lie against the defendant, however improper his behaviour may have been." The malicious statement here (and it must be assumed to have been malicious) was not made in reference to the case then before the Recorder, and so he acted in excess of his jurisdiction in raising this extraneous matter. We all know the effect that observations from the Bench have on an advocate, and how his practice will be affected by them. We do not want the Recorder's money or damages from him, but we want to stop him from making observations which will have the effect that nobody will employ our client.

County Court Judges are the creation of statute, and are not in the same position as judges of the High Court. *The King* v. *Mellor* (2) has a very close analogy. It was decided on the County Courts Act, 1888 (51 & 52 Vict. c. 43), sect. 65.

[DODD J.:—We have no corresponding code in Ireland, but all the judges in *Ward* v. *Freeman* (3) seem to have assumed that for a breach of a ministerial duty imposed by statute an action would lie. The question always is: What is ministerial, and what is not?]

The Court is dealing here with a clash of two privileges. The privilege of an advocate is as sacred in the eye of the law as the privilege of a judge. The statement of claim says that the privilege of the solicitor has been violated. He is entitled to an injunction to preserve his privilege from further infringement.

D. M. Wilson K.C., in reply.

(1) 11 Q. B. D. 588, 599, 601. (2) [1914] 2 K. B. 588.
(3) 2 Ir. C. L. 460.

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DODD J. :—

This action is brought against a judge for what he said in charging a jury. It is specially, therefore, a case in which I should pay heed to the maxim laid down by Bacon, that an Equity Judge should have recourse to his books and not to his brains. It is also well to bear in mind the maxim of Lord Parker, that a judge in applying the principles of equity should bring an intelligent knowledge of the history of our jurisprudence to his aid. I propose, therefore, to answer the questions that arise for my determination in the words of the eminent judges of the past, and not in my own, as far as may be practicable.

The first question that arises is: Is the action maintainable? An answer was given in the time of Henry IV as follows:—"It was resolved that the thing that a judge does as a judge of record ought not to be drawn in question in this Court." Apparently the judge in that case was accused of having treated a trespass as if it were a felony: 27 Ass. pl. 19, given in Salkeld, p. 397, and cited by Holroyd J. in *Basten* v. *Carew* (1) as an authority.

From the date it is almost certain that this decision was either by Chief Justice Gascoigne or had his approval, and his name stands as that of an independent judge tenacious of constitutional right in the subject. That proposition was unchallenged apparently till the reign of James I. It came under review in *Floyd* v. *Barker* (2), and was approved of. "As a judge shall not be drawn in question in the cases aforesaid, at the suit of the parties, no more shall he be charged in the said cases before any other judge at the suit of the King." That was a decision in the Court of Star Chamber.

The same matter came up again for consideration in *Howard* v. *Howell* (3). That was the famous case in which the Recorder of London fined Edward Bushell and eleven other jurors for finding against the evidence, and in default committed them to prison. Bushell applied to the King's Bench on habeas corpus, and the fine and imprisonment were held (Vaughan C.J. presiding) to have been illegal. Bushell brought an action against the Recorder. The matter came before Chief Justice Hale and his puisne judges on a

(1) 3 B. & C. 656. (2) 12 Rep. 24. (3) 2 Mod. 218.

pleading motion; but Chief Justice Hale expressed his mind so plainly that an action would not lie, that Bushell discontinued his action (1). Another of the jurors then brought an action. This action came on a pleading motion before a Court presided over by Vaughan C.J. himself (2). It was held by the full Court that "no action will lie against a judge for a wrongful commitment any more than for an erroneous judgment."

Lord Tenterden in *Garnett* v. *Ferrand* (3) adopts the decision in its entirety. He says:—"No action will lie against a judge of record for any matter done by him in the exercise of his judicial functions. . . . . This freedom from action and question at the suit of an individual is given by law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justice." In *Ward* v. *Freeman* (4) Mr. Justice Perrin, at p. 494, says he would be far from grounding his opinion on *Hamond* v. *Howell* (5) and *Floyd* v. *Barker* (6). It is to be borne in mind, however, that though *Hamond* v. *Howell* (5) was finally decided before a Court presided over by North C.J., of which Mr. Justice Scroggs was a member, Chief Justice Hale and Chief Justice Vaughan had expressed opinions to the same effect as I have already noted. *Floyd* v. *Barker* (6), though a Star Chamber decision, was before a Court of which Lord Coke was a member. But whatever the attitude of mind of Mr. Justice Perrin may have been as to the weight of these two authorities, he unqualifiedly accepted Lord Tenterden's judgment. "The law, in fact," he says (p. 495), "is quite settled, and it is quite unnecessary to refer to the numerous authorities on the subject"; and all the other (nine) judges concurred with him, including the Chief Justice, the Chief Justice of the Common Pleas, and the Chief Baron.

The second question is: What course ought a judge who is sued for what he did as a judge to adopt? An action was brought against a Lord Chief Justice of Ireland, and an action brought against a Lord Chancellor of England. The one case is *Taafe* v. *Downes* (1813). It is reported in 3 Moore's Privy Council Cases, p. 36, in a foot-note. The case excited much public interest.

(1) 1 Mod. 119.
(2) 1 Mod. 184.
(3) 6 B. & C. 625.
(4) 2 I. C. L. Rep. 460.
(5) 2 Mod. 218.
(6) 12 Rep. 24.

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There would appear to have been no reporting authority in Ireland at the date (1813). But a book was published containing an account of the proceedings and judgments by Mr. Hatchell, a member of the Irish Bar (1815) (1). The learned reporter of the English Privy Council cases thought it of importance, and incorporated the greater portion of the judgments in the foot-note. There was a dissenting judgment of Mr. Justice Fletcher, which is not reported by Moore, but is reported at full length by Mr. Hatchell. He held that the act of the Chief Justice in issuing a warrant was extra-judicial. He said the Chief Justice was acting on the occasion as an ordinary justice, and needed for his defence the allegation that an ordinary justice needed.

Mr. Justice Perrin quotes the judgment of Judge Fletcher from page 165 of Mr. Hatchell's book. If the act were a judicial act, he would have concurred with the other judges. His judgment on this is the strongest exposition of the consequences that would follow:—"If an action against a judge for a judicial act were maintainable, it would be absurd, it would be preposterous, as well as unjust in the extreme. It would, besides, be infinite"; and he quotes Lord Coke to that effect.

I quote from Chief Justice Lefroy as to the course Lord Downes adopted in that action—from *Ward* v. *Freeman* (2)—"Lord Downes, with the best advice, and a sense of what belonged to him in respect of his office, took the course that has been taken here; he virtually took the same course; he rested upon that protection that it was his duty on behalf of his office and the law to maintain, his irresponsibility. An action was brought against him for having issued a warrant in Chamber, and he pleaded that he did so as Chief Justice of the Queen's Bench. To that there was a demurrer, and the demurrer was overruled, and a decision made that the judge, when he did what he did, was a judge and acting as a judge of a Court of Record; and he had protection that

(1) Mr. Hatchell's report is procurable in the Four Courts Law Library, the King's Inns Library, and the National Library. The report of the dissenting judgment of Fletcher J. occupies over seventy pages. Mr. Hatchell was afterwards Attorney-General (1850-1852) in Lord John Russell's administration, and was subsequently appointed Commissioner of the Insolvent Court in Ireland. He was born in 1783, and died in 1870. (REPORTER.)

(2) 2 Ir. C. L. Rep., at p. 528.

defended him from any other species of defence. He purposely omitted in the plea a statement of facts, that there was a previous information lodged on which he issued it (the warrant of commitment), and therefore he put on his plea wilfully and designedly that which made it for any other person a bad defence, but which, for a judge of the land, was a good defence, because what he did he did as a judge of the land."

That course was approved of by Lord Mansfield in the celebrated case of *Money* v. *Leach* (1); and in *Mostyn* v. *Fabrigas* (2) he says: "By the law of England if an action is brought against a Judge of Record for an act done by him in his judicial capacity he may plead that he did so as a Judge of Record, and that will be a complete justification." It was also approved of by Erle C.J. in the case of *Kemp* v. *Neville* (3), a leading case in Broom's Constitutional Law.

The only case in which the contrary course was adopted was the case of *Dicas* v. *Lord Brougham* (4) (1833). It was an action for false imprisonment against the Lord Chancellor, founded on orders in bankruptcy, which it was insisted were illegal. The defendant was represented by Sir John Campbell, then Solicitor-General. He undertook to prove that the orders were legal. The aged Earl of Eldon was examined for the plaintiff, one may infer with great reluctance, to prove that in his time no such orders would have been issued. The noble defendant must have been chagrined that, as the law then stood, he could not be examined to contradict Lord Eldon. Lord Lyndhurst was the judge. He was then Chief Baron. He was naturally indignant that an issue between such disputants should be a subject of arbitrament for a jury; and one can gather that he did not think the orders were legal. He said to the Solicitor-General (p. 258): "Why did you allow the evidence to go on? . . . This was an order pronounced judicially, and this warrant is founded on a judicial order. How can an action of trespass lie after that?" He stopped the case, and directed a verdict for the defendant. The case is an object-lesson, and affords the strongest justification for the course the learned Recorder has taken in this case.

(1) 1 W. Bl. 560.
(2) Cowp. 172.
(3) 10 C. B. N. S. 523.
(4) 6 C. & P. 249.

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This case is also referred to by Erle C.J. in *Kemp* v. *Neville* (1). He mentions the interesting fact that a bill of exceptions was tendered and sealed, but it was not pursued further. He approved of the decision.

The third question is: Is the Recorder within the privilege? There are many decisions. I content myself with one. In *Ward* v. *Freeman* (2) an action was brought against an Assistant-Barrister. The ground of complaint was that the defendant, having made a decree against the plaintiff, refused the recognizance of the plaintiff and his sureties, which was necessary in order that he might prosecute an appeal. It was a matter for debate whether the act was ministerial merely or judicial, and on that the Court was divided in opinion. It came to the Exchequer Chamber, when that Court was composed of all the judges of the three law Courts. Ten judges were present, and all were unanimous that the Assistant-Barrister was within the privilege. The history of the jurisdiction as Assistant-Barrister is given by Chief Justice Lefroy (at. p. 522) at some length. He sums up as follows:—"Thus it appears to me that all the ingredients which, according to the authorities, entitle a judge to this privilege of protection, concur in the office of Assistant-Barrister. He is a sworn Judge of Record; he has all the powers, authorities, and status of a Judge of the Superior Courts." The learned Recorder has now, with added dignity, all the jurisdiction and status of the Assistant-Barrister.

I may pause for a little on the controversy raised in that action, for though the matter therein debated cannot be raised now, the law in this respect is worthy of consideration. By what he did, or did not do, in that case, the learned defendant deprived the plaintiff of an appeal that was given to him by statute. And there was almost a complete parallel in the case of the Superior Court. By the statute of Westminster the Second, part of the confirmation of the Great Charter in the reign of Edward I, a judge was bound to sign or seal a bill of exceptions. That was a necessary preliminary to an appeal by the party objecting. There was no remedy given by the statute for the breach of this duty. What was the remedy? The remedy might be by a writ from the

(1) 10 C. B. N. S. 523. (2) 2 I. C. L. Rep. 460.

Lord Chancellor; and if the judge made a return of "non ita," there would be an action against him for a false return. Or it might be an action on the case for breach of the statutory duty imposed by the statute. Similarly an action would lie against an Assistant-Barrister for refusing recognizances. Mr. Justice Perrin dissented in the Exchequer Chamber from his own decision in the Queen's Bench; Mr. Justice Torrens agreed with him; Chief Baron Pigot and Chief Justice Monahan were of opinion that an action would lie against a judge of a Superior Court for not signing a bill of exceptions, and would lie against an Assistant-Barrister for refusing a recognizance. Neither judge could stop an appeal from his own decision. The Legislature has changed all that. Bills of exceptions have become obsolete. I may be pardoned for drawing the attention of my brethren now practising at the Bar—none of whom, perhaps, ever tendered a bill of exceptions—few of whom, perhaps, ever saw such a parchment—to this great weapon. It was, in the hands of an independent advocate, potent against the misdirection of an arbitrary or a stupid judge. It was recognized and appreciated by the judges themselves, as a charter of liberty to the subject (though one cannot say the duty was never evaded), which was maintained inviolate by the judges. All that remains of it now is what one often hears, "Your lordship having told the jury so and so, I call upon your lordship so and so." Even this fragment of the blade is not without its potency. I may note in passing that by the statute an action would lie against a judge for refusing a writ of habeas corpus in vacation.

The fourth question is: Does malice deprive a judge of the protection? The answer may be given to this also in the words of the books in *Barnardiston* v. *Soame* (1). It is laid down that "No action will lie against a judge for what he does judicially, though it should be laid falso malitiose et scienter. They who are intrusted to judge ought to be free from vexation, that they may determine without fear; the law requires courage in a judge, and therefore provides security for the support of that courage." And if it be objected that this is an old authority, and from the State Trials, it has been adopted by all the eminent judges whose decisions I have already cited.

(1) 6 State Trials, 1063.

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In Scotland it was held that a censure pronounced from the Bench by a judge of the Court of Session on an advocate for his manner of pleading in a cause did not afford competent ground for an action, though averred to be unfounded, malicious, and injurious: *Hagarts Trustees* v. *Hope* (1). This decision was upheld in the House of Lords (2). (Cited in Broom's Constitutional Law, p. 788. But this decision is more relevant on the next question.)

The fifth question is: Does the protection extend to words as well as to acts of the judge? One might here, perhaps, use a little common sense. If an action for conspiracy will not lie, by reason whereof a man was imprisoned, will it lie for slanderous words used in inflicting the sentence?

If an action will not lie for treating a trespass as if it were a felony, and committing a man to prison, will it lie for words imputing felony? If Hamond had no right of action for being committed to Newgate, would an action lie for words imputing to him that he had found a verdict against the evidence? As Judge Fletcher would say, "It would be absurd; it would be preposterous as well as unjust." But this, too, is the subject of express decision. This is not the Court for an action of defamation. That is a common law action, and subject to well-established principles. The privilege of a judge as to words spoken in the course of a judicial trial is absolute. So is the privilege of the advocate and of a witness. Indeed, it is conceded such an action would not lie at common law. It never was questioned, I think, except once. Cockburn C.J. did venture to say: "I am reluctant to decide, and will not do so until the question comes before me, that if a judge abuses his judicial office by using slanderous words maliciously and without reasonable and probable cause he is not to be liable to an action": *Thomas* v. *Churton* (3). It was an unfortunate dictum for a man called Scott. He was an accountant and scrivener, and the defendant, a County Court Judge, said, "You are a harpy preying on the vitals of the poor." He brought an action against the judge on the dictum. It came before the Court of Exchequer: *Scott* v. *Stansfield* (4). Chief Baron Kelly rested his judgment on *Floyd* v. *Barker* (5), having seen, I gather, that Lord Coke was

(1) 20 Fac. Dec. 371.
(2) Shaw, App. Cas. 125, 143.
(3) 2 B. & S. 475, at p. 479.
(4) L. R. 3 Ex. 220.
(5) 12 Rep. 24.

a member of the Court. He says, at p. 223:—"The question arises, perhaps for the first time, with reference to a County Court Judge; but a series of decisions from the time of Lord Coke down uniformly to the same effect establish the general proposition that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a Court of Justice." The law is the same in America: *Yates* v. *Lansing*, a decision of Chief Justice Kent. Baron Martin and Baron Bramwell and Baron Channell each gave a separate judgment in *Scott* v. *Stansfield* (1), setting forth reasons similar to those already cited, and grounded on the same principle. The Scottish decision is to the same effect.

The sixth question is: Has this Court power to interfere? Granted, an action at law is not maintainable. The reason is, a judge is not to have his conduct reviewed by a jury. In a Court of Equity the inconveniences referred to would not arise. For that very reason a Court of Equity should intervene. Otherwise there would be a wrong without a remedy. We do not seek damages. We do not want an action. We do not want an injunction. All we ask is a declaration. We want freedom from adverse comment. At this stage the books fail me—at any rate on the positive side. There is no case for my guidance. But on the negative side the answer is complete. There is no such case; there is no precedent. And here, therefore, one must use a modicum of common sense. If judge can sit upon judge, where is it to end? This is what Mr. Justice Fletcher meant by "infinite." Can I review the Lord Chancellor? The Chief Justice? Would it tend to decency or decorum, that even while I was restraining another judge I was preparing material for some other judge to restrain me? But, in fact, the books are not so silent. The earliest cases make no reference to juries. That reference to them is only made in later cases to emphasize the inconvenience: *Floyd* v. *Barker* (2). "The reason why a judge . . . shall not be drawn in question before any other judge is," and the reason is there set forth. And in Lord Tenterden's leading judgment, now accepted as laying down the law, there is no reference to a jury. His words are—"It is a general rule of great antiquity that no action will lie against a judge of Record. It is better

(1) L. R. 3 Ex. 220.
(2) 12 Rep. 24, 25.

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that an individual should occasionally suffer a wrong than that the general cause of justice should be impeded and fettered by constant and perpetual restraints and apprehension of those who are to administer it."

The last question is, assuming that the defendant was right in not submitting his conduct as a judge to the arbitrament of another judge, is this motion the proper method of raising that defence?

The notice of motion is based upon two grounds—1, that the statement of claim discloses no cause of action, and 2, that the action is frivolous and vexatious.

I could wish that the second ground had been omitted. The legal advisers of the learned Recorder might well have borne in mind the delicate duty cast upon a judge who is to decide such a question. We exercise our jurisdiction subject to public opinion. A judge who courts popularity is not a judge to be respected. A judge who disdains public opinion is not a good judge. It is permissible to a judge to endeavour to commend the justice that he administers to the people among whom he administers it. Enlightened public opinion in its turn exercises a stimulating and restraining influence on the judge. A solicitor complains that he has been injured in his profession by a judge and that he has no redress elsewhere, and seeks it here. And I am asked to rule that such an action is frivolous and vexatious. I ought not to have been asked to do so. There is this to be said for the learned counsel who drafted the notice of motion, that the words "frivolous and vexatious" are used sometimes to indicate an action that is not maintainable. This is not accurate. It would go out that the judge of this Court had banged the door on a suitor, because the defendant was a judge, and I do not wish to leave my decision open to any such comment. I therefore decide that this action is not frivolous or vexatious. I decline to decide that this action is frivolous or vexatious.

There remains the second ground. The rule Order 25, rule 1, upon which the motion is grounded is one under a general heading, "Demurrer and Proceedings in lieu of Demurrer." The first rule of the order abolishes demurrer, "without special leave of the Court or a judge." I take this application to be in lieu of a

demurrer, and I make a special order that the matter be disposed of on this application. I hold the action is not maintainable. By no possibility could it succeed. I therefore give judgment as if there were a demurrer for want of equity. I dismiss the action. This takes away all ground of complaint put forward by the counsel for the plaintiff that they have not been allowed to go into the facts. The allegations must be taken as admitted as if this was a demurrer. The costs of course must follow.

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Solicitors for the plaintiff: *Lynch & Deering.*
Solicitors for the defendant: *White, M'Millan, and Wheeler.*

R. W. L.

IN THE MATTER OF THE ESTATE OF ARTHUR USSHER.

Wylie J.
1918.
Mar. 14, 25.

Interest—Arrears of jointure charged on lands sold under the Land Purchase Acts—Death of jointress long prior to sale.

Under a marriage settlement, a jointure, charged on the settled lands, became payable to the wife on the death of the husband in 1880. The wife died in 1897. The jointure was then heavily in arrear. By her will she bequeathed the arrears to her daughter-in-law. Payments on account of the arrears were made from time to time by the agent for the owner of the lands. The lands were subsequently sold under the Land Purchase Acts. The amount due for arrears was in dispute, but, on the vouching before the Examiner, it was agreed between the parties to accept as the basis of calculation the amount shown to be due in 1909 by the ledger account of the agent.

Held, that no interest was payable on the arrears.

QUESTION arising on the ruling of the final schedule of incumbrances as to whether interest was payable on a sum due for arrears of jointure charged on the lands sold in this matter under the Land Purchase Acts.

The facts, as stated in the judgment of WYLIE J., were as follows:—

By a settlement, dated the 6th December, 1833, executed on the marriage of Christopher Ussher with Eleanor O'Grady, the lands sold in this matter were settled, subject to a jointure annuity of £300 per annum payable, after the death of the said

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Christopher Ussher to the said Eleanor O'Grady, otherwise Ussher, in case she should survive her husband. Christopher Ussher died in 1880, and Eleanor Ussher, his wife, in 1897. On the death of Eleanor Ussher a large sum was due for arrears of annuity, and she bequeathed these arrears to her daughter-in-law, Kate Emily Ussher, for herself and her two sons. Payments on account of the arrears were made from time to time by the agent for the owner, who was the son of the said Eleanor Ussher, and husband of the said Kate Emily Ussher.

The amount due in respect of these arrears was the subject of much discussion and dispute, but finally, when the matter was before the Examiner, the parties agreed to accept, as the basis of calculation, the amount shown to be due in February, 1909, by the ledger account of the agent at that date, viz., £1328 16*s.* 7*d.* The claimant now claimed this sum (less two small sums since paid on account), together with interest at 4 per cent. for the period commencing six years prior to the order charging claims on the purchase-money. There being two sales and two orders charging claims, one in 1914 and another in 1917, the dispute before the Examiner was as to whether this period should commence six years prior to the first or second charging order; but, when the schedule came on for ruling, the incumbrancers puisne to the jointure raised the question as to whether any interest at all was payable on arrears of annuity.

J. E. Walsh, for the claimant, Kate Emily Ussher:—

The parties have agreed to adopt the sum shown in the agent's ledger account for February, 1909, as the amount due for arrears at that date on an account stated and settled. That sum was a charge on the lands sold, and should carry interest according to the ordinary rule: *In re Drax*; *Savile* v. *Drax* (1). The fact that the sum is made up of periodic payments makes no difference: *In re Salvin*; *Worseley* v. *Marshad* (2). There the question arose, in an administration action, as to whether interest should be allowed, under Order 55, rules 62, 63, on arrears of an annuity, which the testator had covenanted to pay, and Eve J. said (at p. 335) that he could see no distinction between a debt arising

(1) [1903] 1 Ch. 781. (2) [1912] 1 Ch. 332.

out of a covenant to make a series of periodic payments and one founded on an obligation to pay money where there was no contract or statutory provision as to interest. See also *Scottish Provident Institution* v. *Conolly* (1). In any event, the procedure under the Land Purchase Acts brings the case within the exceptions to the general rule that no interest will be allowed on arrears of an annuity. By the order attaching claims to the purchase-money, the claimant was deprived of her legal remedy to bring an action to raise the arrears. Had she been in a position do so, she could have claimed interest from the date of the judgment under Order 55. She should, at least, be allowed interest from the date of the order attaching claims.

R. H. Macrory, for puisne incumbrancers:—

The well-established rule is that arrears do not carry interest: *Torre* v. *Browne* (2); *In re Hiscoe, Hiscoe* v. *Waite* (3); *Beamish* v. *Farmer* (4). There is nothing here to bring the case within the exceptions to the general rule. Under the order attaching claims, exactly the same rights attached to the purchase-money as formerly attached to the lands. The order is not of the nature of a judgment of the Court, so as to make claims attaching bear interest.

Cur. adv. vult.

WYLIE J. having stated the facts as above set out, continued:—

Mr. Walsh, on behalf of the claimant, contended that where a definite sum is ascertained to be due and payable at a particular time, and secured by a charge on land, a Court of Equity allows interest on that sum from the time when it became payable. There is no doubt as to this general rule. It is expressed thus in *In re Drax, Savile* v. *Drax* (5), by Collins L.J. (at p. 793):—"It seems to me to be well established on the authorities, that a Court of Equity has power to give interest, and in point of fact does so, where a charge is created on land, although there are no words allowing interest in the instrument creating the charge"; by Cozens-Hardy L.J. (at p. 795):—"It is perfectly well settled that where you have an equitable charge on land, to secure the payment of a

(1) 31 L. R. Ir. 329.
(2) 5 H. L. C. 655.
(3) 71 L. J. Ch. 347.
(4) I. R. 1 Eq. 466.
(5) [1905] 1 Ch. 781.

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debt, it carries interest, although there is no mention of interest in the instrument of charge"; and by Romer L.J. (at. p. 794) in more precise terms, thus:—"Now I take it to be settled at the present day, that if you find in any settlement or contract a provision that a sum of money is to be charged on land, and the money is to be paid at a fixed time, the sum itself being fixed, then as between the owner of the land and the person entitled to the money, although nothing is said in the settlement or contract as to interest, in the eye of a Court of Equity, from the date fixed for payment of the money, that money bears interest." Mr. Walsh, relying upon this rule of equity, contends that in this case a fixed sum of £1328 16*s.* 7*d.* was ascertained to be due and payable for arrears of jointure in March, 1909, which was a charge on the lands sold, and that it ought to bear interest from that date. But how and when was this sum ascertained or fixed? The jointure of £300 a year became payable in 1880, and continued payable until the death of the annuitant in March, 1897, when large arrears had accrued. There was no settlement or ascertainment at that time of the amount due, but subsequently up to 1909 sums were paid from time to time on account. The agency account, as contained in the agent's ledger for 1909, states that the balance then due on foot of arrears was £1328 16*s.* 7*d.*; but this sum was not accepted or admitted to be correct by the claimant until February, 1918. In fact, in her first affidavit of claim, made in November, 1917, she made a much larger claim. During all the accounting period, from 1897 to 1909, no interest was ever claimed or allowed. It would therefore seem to me that, in point of fact, no fixed sum was ascertained to be due until it was agreed to before the Examiner on the vouching of the final schedule in February last; and it is difficult to see how the rule as to interest, above stated, can apply to it.

But there is another rule of law equally well settled, viz., that, unless in exceptional cases, interest is not allowed on arrears of an annuity charged on land. This rule has been laid down in numerous cases that will be found discussed in *Beamish* v. *Farmer* (1) and *In re Salvin, Worseley* v. *Marshall* (2). The exceptional cases are referred to in *Torre* v. *Browne* (3) by the Lord

(1) I. R. 1 Eq. 466. (2) [1912] 1 Ch. 332. (3) 5 H. L. C. 555, at p. 578.

Chancellor thus:—"The cases in which in later times the Court, in the absence of express contract, has allowed interest have been confined to those where the annuitant has held some legal security, which, but for the interference of the Court, he might have made available for the obtaining of interest, or where the accumulation of arrears have been occasioned by the misconduct of the party bound to pay. But mere delay is certainly no sufficient ground for giving interest." Now, the party who was bound to pay in this case was the son of the jointress, with whom she was living, and the husband of the claimant, to whom the arrears were bequeathed; and there has been no suggestion of any misconduct on his part, and there was no legal remedy interfered with by which the annuitant could have obtained interest. Her remedy was a suit in equity to raise the arrears. That was the course taken in *Beamish* v. *Farmer* (1); and although, in that case, the amount due for arrears had been ascertained by a decree and declared well charged on the lands, and only paid years afterwards in a subsequent administration suit, the Master of the Rolls held that the arrears did not carry interest. Mr. Walsh relied upon the recent case of *Worseley* v. *Marshall* (2), where Eve J., in an administration suit, allowed interest upon arrears of an annuity which the testator, whose estate was being administered, had covenanted to pay on fixed half-yearly gale days, but which was not charged on land. The learned judge allowed interest from the date of the judgment in the action, in accordance with Order 55, rr. 62, 63, upon the amount due at the date of the judgment, and upon subsequently accruing gales from the respective dates when they became due, being of opinion that the rule against allowing interest on arrears of annuity only applied as between incumbrancers and as against the land charged.

Mr. Walsh then raised a further point with the view, as I understood, of bringing this case within the exceptions to the rule against allowing interest. He suggested that the vendor had, by selling the estate and thereby causing a statutory transfer of the charges from the lands to the purchase-money, prevented the claimant from pursuing her legal remedy against the lands; but, as I have said, she had no legal remedy against the lands by

(1) I. R. 1 Eq. 466. (2) [1912] 1 Ch. 332.

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which she could recover interest on the arrears, and she obtained an easier and quicker remedy for her arrears by simply applying to this Court for payment out of the interest in lieu of rent or the income from the investments of the purchase-money. Mr. Walsh also suggested, as I understood, that the order charging claims upon the purchase-money was equivalent to a judgment of the Court declaring a fixed sum well charged upon the land, which he contended would thereafter carry interest. But, as I have shown, in *Beamish* v. *Farmer* (1), and I think also in *Torre* v. *Browne* (2), an ascertained sum for arrears was declared well charged by a decree of the Court, and was held not to carry interest. Besides, it appears to me there is no similarity whatever between the order made under the Land Purchase Acts charging claims and a judgment of the Court.

An order charging claims is not in any sense an adjudication upon any claim. It is merely a formal ministerial act done pursuant to the direction contained in the statute, by which the statutory transfer of all claims affecting the land, from the land to the purchase-money, is carried out; and all such claims are by the statute declared to attach to the purchase-money in like manner as immediately before the date of the order they attached to the land. Therefore, a claim for money charged on the land, whether, at the date of the order, of an ascertained amount or not, which did not bear interest as against the land, could not by virtue of the order bear interest as against the purchase-money.

I therefore hold that no interest is payable on the arrears of annuity in this case.

Solicitors for Kate Emily Ussher: *I. Thornton & Son.*
Solicitor for puisne incumbrancers: *W. J. Verlin.*

J. E. W.

(1) [1912] 1 Ch. 332.

(2) 5 H. L. C. 555.

WESTROPP *v.* CONGESTED DISTRICTS BOARD.

Barton J.
1916.
Nov. 29, 30.
Dec. 1, 6, 7, 8, 20.

Appeal.
1917.
June 7, 8, 11, 12, 13.

1918.
Feb. 4.

Profit à prendre—Turbary—Reservation—Perpetuity—Vesting Order—Superior Interest.

There cannot be a grant of a profit à prendre appurtenant without a capable grantee. A series of residents in a house are not capable grantees.

The plaintiff's father conveyed to the plaintiff his life estate in certain lands, and his estate in fee in certain other lands, including F. bog, retaining the mansion house and demesne of M. (of which he was tenant for life and the plaintiff remainderman), and the house of F. (of which he was owner in fee). The conveyance contained the following reservation:—"Excepting and reserving out of the said bog of F. to the person or persons who now or at any future time shall reside in the mansion house of M. or in F. house, the right of cutting turf exclusively for consumption in the said mansion house of M. and the house of F., and to include a reasonable right of access to the said bog for the purpose of exercising such right of turbary."

In May, 1912, the parties having failed to agree, the Congested Districts Board made a final offer to purchase from the plaintiff the estates, including F. bog. In July, 1912, the plaintiff, as remainderman as to M. and as devisee as to F., succeeded his father as owner in possession of the mansion house of M. and the house of F. Plaintiff, having claimed a right of turbary in the F. bog, his right was admitted both by the Irish Land Commission and by the Congested Districts Board, and was recognized on the face of the vesting order vesting the lands in the Board.

In an action by the plaintiff to enforce such right of turbary, *held*, by the Court of Appeal (affirming Barton J.), that the reservation conveyed no right of turbary extending beyond the life of the grantee, and that the action should be dismissed on this point.

Held by Sir I. O'Brien C. (Ronan L.J. dissentiente), that if the reservation in the deed had been valid, it would not have been ultra vires the Land Commission to make the vesting order subject to such reservation; and that in this respect there is no logical difference between ordinary sales and final-offer cases.

Per Molony L.J., that as the Congested Districts Board were registered as full owners of the lands subject to the express reservation, the latter could only be got rid of by substantive proceedings, under the Local Registration of Title Act, 1891, to rectify the Register.

The right of the Irish Land Commission to make vesting orders subject to reservations considered.

TRIAL OF ACTION.

The plaintiff, the only son of the late Colonel O'Callaghan, brought the action for the purpose of having certain turbary rights enforced by means of declaration of right and for an

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injunction. His father, Colonel O'Callaghan, conveyed to the plaintiff, by deed dated the 23rd February, 1908, his life estate in certain lands, and his estate in fee in certain other lands, including Fortanebeg Bog. Colonel O'Callaghan retained the mansion house and demesne of Maryfort (of which he was tenant for life and the plaintiff remainderman), and the house of Fortanebeg, of which he was owner in fee. The conveyance contained the following reservation of turbary, which is the subject-matter of this action:—"Excepting and reserving out of the said bog of Fortanebeg to the person or persons who now or at any future time shall reside in the Mansion House of Maryfort or in Fortanebeg House the right of cutting turf exclusively for consumption in the said mansion house of Maryfort and the house of Fortanebeg, and to include a reasonable right of access to the said bog for the purpose of exercising such right of turbary." The Congested Districts Board desired to purchase the estates, which included Fortanebeg Bog, but the parties failed to agree, and accordingly the Board, in May, 1912, made a final offer under their seal to the plaintiff under the compulsory powers of the Irish Land Act, 1909, for £41,000 in cash, which was accepted. Colonel O'Callaghan was then alive, and was exercising the right of turbary in connexion with Maryfort House, where he resided, and he exercised the right of turbary in respect to that house down to his death in 1912. The house of Fortanebeg was not resided in at the date of the conveyance, and had not been resided in for about thirty years. In July, 1912, Colonel O'Callaghan died, having devised Fortanebeg House and demesne to plaintiff, who, as remainderman in the case of Maryfort and as devisee in the case of Fortanebeg, succeeded to the dominant tenements. He claimed this profit à prendre, and his right was admitted by the Irish Land Commission and the Congested Districts Board. It was recognized upon the face of the vesting order, which was approved by the legal adviser of the Congested Districts Board. The vesting order, dated 21st November, 1912, was made subject "to the turbary rights reserved to the occupiers of houses in Maryfort and Fortane by a conveyance, dated the 23rd day of February, 1908."

Jellett K.C., *Powell K.C.*, and *Phelps*, for the plaintiff.

S. L. Brown K.C., *M'Cann K.C.*, and *Leonard*, for the defendants.

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BARTON J., having stated the facts, continued:—

I at once approach the question whether this reservation created a perpetual right of turbary appurtenant to these houses, and I shall proceed to give my reasons for concluding that, although I assume that it conferred a personal right upon any then living resident of either of these houses, it did not, and could not, create any greater appurtenant right. The ordinary form of grant creating a right of this kind is a grant to a grantee, his heirs and his assigns, with liberty for him, his tenants, licensees, &c. (which would include resident), to enter and carry away turf from the servient bog for the use of, and to be consumed in, the house in question. I need not discuss the question whether words of limitation would be necessary. Upon that question reference may be made to the opinions of three eminent text-writers, to be found in the *Law Quarterly Review*, vol. xxv, pp. 199, 264, 289; and upon this branch of the case reference may also be made to the Conveyancing Act, 1881, sect. 62, enabling easements and other rights to be created by way of use. In the present case the reservation is not made to Col. O'Callaghan himself. It is not contended that the deed should be rectified, or that it should be construed as being made to Col. O'Callaghan and his successors for the benefit of residents. Perhaps the explanation of this peculiar form of conveyancing may be that Colonel O'Callaghan was only tenant for life of Maryfort; and it is questionable whether the grantee of rights of this kind must not have an interest at least co-extensive with the estate for which the right is created (see Halsbury xi, 246; *Dyncvor* v. *Tennant* (1), per Lord Herschell). I need not pursue that question, as it does not arise. The reservation is to present and future residents and to nobody else. The reservation, being a re-grant in the eye of the law, may be made to a third party: *Wickham* v. *Hawker* (2), but not to a person or series of persons incapable of taking by a grant, such as a series of residents, who have no estate in the dominant tenement. If such a grant were effective, the right must be separated from every legal estate in the dominant tenement and become incapable of being ever released—a result

(1) 13 A. C. 279, at p. 292. (2) 7 M. & W. 63.

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which would violate legal principle, and involve consequences which the law does not allow. No precedent or authority has been cited in favour of a grant to a series of successive residents. The conveyancer has in that respect broken fresh ground. But it has sometimes been sought to attribute alleged prescriptive rights of easements or profits à prendre to an ancient grant made to residents or occupiers. These cases are in point, because prescription presupposes a grant to have anciently existed, and one of the tests of the legality of the origin of such a prescriptive claim is whether it can be referred to a grant from a person capable of making a grant to a person capable of taking under a grant. Such a case was *Gateward's Case* (1), where the main question at issue was whether there could be a custom for inhabitants, as such, to have profit à prendre in the soil of another. The Court incidentally laid down several pertinent rules about rights of common (which include turbary): e.g. (*a*) that there are only four well-known kinds of common, and that a common ratione commorantiae et residentiae, i.e. by reason of dwelling and residence in a house, is not one of them; (*b*) that an inhabitant or resident, as such, has no estate in the house, and therefore can have no estate in the common; (*c*) that a common ratione residentiae would be abnormal, not being capable of being extinguished, because if one inhabitant should release it, the next one would have it again; that residents must prescribe in the name of the owner, not in their own name; and (*d*) that one distinction between prescription and custom is, that prescription is always alleged in a person, but custom merely in the land.

Gateward's Case (1) was applied in *Commissioners of Sewers of the City of London* v. *Glasse* (2), where certain occupiers of lands claimed (inter alia) prescriptive rights of common appurtenant to the lands which they respectively occupied. Mellish L.J., at the foot of p. 467, said: "The main objection which was taken was that the right was alleged in the occupiers, and that the occupiers could not have such a right. There is no doubt that the occupiers could not have the right; but looking at the allegation in the Bill, it appears to me that the right is substantially alleged in the owners on behalf of themselves and the occupier . . . of course the

(1) 6 Co. Rep. 59*b*. (2) L. R. 7 Ch. App. 456, 467.

occupiers are the persons who de facto enjoy the right, although that right is gained to them through its belonging to the owner from whom they get their estates." Many other authorities might be cited to the same effect, e.g. Fry J.'s observations in *Austin* v. *Amhurst* (1) in speaking of a claim of a mere occupier to prescribe in respect of a que estate: "Now it is difficult to see what que estate there can be in a mere occupier, for if there be any que estate at all, it is the estate of the landlord under whom the occupier claims." I apply these cases to the present one, in which the grant is not to the owners on behalf of themselves and the occupiers or residents, but to the residents themselves, who cannot themselves be grantees of such a right. Some reference was made in the argument to immemorial rights attached to ancient tenements, and to profits à prendre appendant, which are to be found in England in rare cases where they existed before the Statute of Quia Emptores in 1290. But these ancient rights bear no analogy to a modern grant of rights appurtenant to modern mansion houses. Reference was also made to covenants running with the land; but a covenant with a series of mere residents could not run with the land. In the case of an ordinary covenant no person not a party to the deed can avail himself of it unless he be a living person at the date of the deed (*Kelsey* v. *Dodd* (2), applied by Fletcher Moulton L.J. in *Forster* v. *Elvet Colliery Company* (3)). Besides, it is questionable whether the defendants as assignees of the covenantor would be bound by such a covenant, if this reservation be regarded as one. The *South Eastern Railway Case* (4), cited for plaintiff, turned on the fact that the defendant was not an assignee but the actual original covenantor. At the close of the case I did not understand the plaintiff's counsel to seriously rely on covenant. Mr. Powell put the case in this way. He said there was a clearly expressed intention to create a permanent profit à prendre, and that no mere technicality should stand in the way of giving effect to the intention of the parties. I agree; but this is more than a mere technicality. There cannot be a grant of profit à prendre appurtenant without a capable grantee. A series of residents are not capable grantees. They can enjoy such rights, but only under

(1) 7 Ch. D. 689, at p. 692.
(2) 52 L. J. Ch. 34, at p. 39.
(3) [1908] 1 K. B. 629, at p. 637.
(4) [1910] 1 Ch. 12.

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and through a line of persons having a legal estate in the dominant tenement. If they are capable grantees, the owners of this house could never release this right; and nobody could ever release it. The rights in this bog would of necessity for ever remain unsettled. If so, this is not a technicality, but a point of fundamental principle.

I need not discuss some other legal difficulties which stand in the plaintiff's way. For example, it has been pointed out that, even if a resident can succeed to such a right, the plaintiff is not a resident in Fortanebeg House. Then, again, there was not at the date of the deed, and may never be, a resident in Fortanebeg House. Does not a grant violate the rule against perpetuities, if it may never take effect, and the grantee is not and may never be ascertained? Again, there is the difficulty that Colonel O'Callaghan, who purported to reserve this right, was only tenant for life of Maryfort. I need not deal with Mr. M'Cann's forcible argument that, as the parties were a father and his only son, who stood in the relation of tenant for life and remainderman of one house, and shortly afterwards of devisor and devisee of the other, it could hardly have been seriously intended to create a right or rights beyond Colonel O'Callaghan's life. Finally, I do not find it necessary to discuss the curious old case of *Atkins* v. *Montague* (1), so much censured by Mr. Challis in his book on Real Property (3rd ed., p. 114), beyond saying that it did not relate, and has not been applied, to a grant of a profit à prendre or other interest in land; nor can I attach that meaning to the words quoted from the arguments in *Corbet's Case* (2). A right of common may be created to arise in future, but not so as to violate the rule against perpetuities or any other rule of law.

I do not regard the entry in the vesting order as a conclusive estoppel. In my opinion both the vesting order and the consequential entry in the register of title are rectifiable, if they were made through a mistake. The attention of the Board was specially drawn and given to the entry in the vesting order. The point which I think is fatal to the plaintiff's right was not noticed by anybody. The next three years were occupied with lengthened

(1) 1 Ch. Cas. 214. (2) 1 Co. Rep. 83*b*, 87*a*.

negotiations and correspondence; but the plaintiff's right was never challenged or disputed until the defence in this action was delivered.

[His Lordship then referred to negotiations and correspondence between the plaintiff and the Congested Districts Board as to dividing up the bog, and proceeded]:—

A great part of the argument was occupied with the defence that the vesting order was ultra vires so far as if purported to vest the bog in the Board subject to the plaintiff's turbary right. It was contended that where the Land Purchase Acts purport to protect the easements, rights, and appurtenances which third parties may possess over lands purchased by the Congested Districts Board, it only extends the protection to such third parties as are tenants of holdings within the meaning of the Land Acts. I can find nothing in the Acts which either expressly or by implication justifies this contention. The defendants also contend that the right of turbary was a superior interest, which should have been redeemed because it was created by a reservation, and "reservations" are included in the definition of superior interests in sect. 3, sub-s. 8, of the Land Law (Ireland) Act, 1896. But it is well settled that this class of reservations of profits à prendre are not reservations properly so called, but are, in the eye of the law, re-grants of the profit à prendre. Upon this point I am unable to agree with the defendants' arguments.

The defendants have won; but they have succeeded on a point which only occupied a small portion of the time, and caused an infinitesimal part of the costs, of the trial. Upon most of the other points of the case they have been unsuccessful. I think that it would be unjust either to give them or to deprive them of all the fruits of victory; and that, in dismissing the action, justice will be done by directing the defendants' costs to be taxed, and by ordering that the plaintiff do pay to the defendants one-half of their taxed costs.

D. M. S.

Appeal.
1917.

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v.
C. D. B.

June 7, 8 11, 12, 13.

1918.

Feb. 4.

The plaintiff appealed to the Court of Appeal.

Jellett K.C., *Powell K.C.*, and *Phelps*, for the appellant:—

The appellant had an existing right of turbary when his lands were acquired by the Congested Districts Board. His right was recognized by the Land Commission and by the Board throughout, and it is a breach of faith to deny it now. As they have treated the provision in the deed of the 23rd February, 1908, as valid, and have acquired the plaintiff's lands on this basis, it is now too late to contend that the provision is invalid: *McManus* v. *Cooke* (1); *Roe* v. *The Mutual Loan Fund, Limited* (2). It is immaterial whether the right was in fact exercised or not: see judgment of Stirling J. in *Robertson* v. *Hartopp* (3). It was a right vested in the successive resident owners of the houses named, who could exercise the right through their tenants. The right being an incorporeal hereditament, which could only pass by deed, could not be abandoned: *Neill* v. *Duke of Devonshire* (4). [Ronan L.J. referred to *Witham* v. *Vane* (5).] The provision in the deed was not void for perpetuity: *South Eastern Railway* v. *Associated Portland Cement Manufacturers* (1900), *Ltd.* (6), where *London and South Western Railway Company* v. *Gomm* (7) was distinguished. This was an estate or interest in property, created or existing in praesenti, so as to be vested in defined persons, which could last for an indefinite time without offending the rule against perpetuities. See Lord Halsbury's Laws of England, vol. xxii, pp. 299–322.

The right created by the deed was valid, at least qua existing lives: *Lord Dungannon* v. *Smith* (8). In *Wright* v. *Hobert* (9) a grant of law to charitable uses, "that as many of the inhabitants of the parish of *A* as were able to buy three cows might feed them on the land," was held valid, and to extend to every inhabitant who had three cows. The right was conferred, not by a reservation, but by a re-grant. It was, therefore, not "superior

(1) 35 Ch. D. 681.
(2) 19 Q. B. D. 347
(3) 43 Ch. D. 484, at pp. 499–500.
(4) 8 A. C. 135.
(5) Challis's Real Property, 3rd ed. App., v, 440.
(6) [1910] 1 Ch. 12.
(7) 20 Ch. D. 562, 579.
(8) 12 Cl. & Finn. 546, at p. 624.
(9) 9 Mod. Rep. 65.

interest," which required to be redeemed compulsorily. If we are wrong in this contention, it is clear that the desired result could have been effected by proper conveyancing, and, if necessary, we ask that the deed of 1908 be treated as rectified, so as to avoid a gross injustice to the plaintiff. Further, the vesting order, subject to the provision as to turbary, has been registered under the provisions of the Local Registration of Title (Ireland) Act, 1891, and the registration is conclusive. Its effect cannot be altered in this proceeding. The Land Commission has power to make vesting orders under sect. 16 of the Irish Land Act, 1903, not only subject to the matters comprised under the headings (*a*), (*b*), (*c*), contained in that section, but also subject "to any easements, rights, and appurtenances mentioned in sect. 34 of the Act of 1896"; and it is only "save as aforesaid" that all claims on the lands in respect of superior interests must be redeemed. Accordingly, if sect. 16 applies to the vesting order in this case, it extends the provisions of sect. 34 of the Act of 1896 to the new subject-matter of "estates," including both tenanted and untenanted lands, and that section is not confined merely to holdings as theretofore: see also sect. 43, sub-s. 2, of the Act of 1909 as to the contents of a final offer, where rights under sect. 34 of the Act of 1896 are again introduced.

The right here in question was a previously existing right within sect. 34 of the Act of 1896, and there was full jurisdiction to make a vesting order subject to it. This has been the settled practice of the Irish Land Commission, and to upset it now would disturb existing rights to an unknown extent. To decide that the vesting order was ultra vires the Land Commission, when all parties believed in the existence of the right, and possession of the lands was obtained on the basis of its existence, would be to extend the principle of ultra vires beyond any reported decision: see *Eastern Counties Railway Company* v. *Hawkes* (1).

S. L. Brown K.C., *T. S. M'Cann K.C.*, and *Leonard*, for the respondents:—

The provision in the deed of 1908 as to turbary is a reservation and nothing else, and, assuming it for a moment to be good

(1) 5 H. L. C. 331.

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in law, the plaintiff has misconceived his rights. The defendants purchased the fee-simple of the bog. They could cut turf, or send in others to cut turf, where they pleased, and, so long as enough was left to satisfy the plaintiff's claims under the deed, he has no ground for complaint, as he had no exclusive right: *Sutherland* v. *Heathcote* (1). The reservation was, however, wholly bad in law. A right in the nature of a profit à prendre in alieno solo given to a shifting and uncertain class of persons, such as the occupiers of certain houses, clearly offends the rule against perpetuities: *Commissioners of Sewers of the City of London* v. *Glasse* (2); *Goodman* v. *Saltash* (3); *Kennedy* v. *Kennedy* (4). If the reservation in the deed was bad, the reservation in the vesting order is of no effect, and the action must be dismissed.

We further contend that the inclusion of such a reservation in the vesting order was ultra vires the Land Commission. Vesting orders first appear in sect. 8 of the Purchase of Land (Ireland) Act, 1885, which deals only with the vesting of "holdings" in tenant purchasers. Under this Act there was no compulsory redemption of superior interests, and the landlord had to make good title to the lands sold. Sect. 31, sub-s. 1, of the Land Law (Ireland) Act, 1896, provided for the extinguishment of superior interests, and sub-s. 2 of this section provided that vesting orders should be subject to such exceptions and reservations as are therein mentioned; but here again the subject-matter dealt with was "holdings" only. Under the Irish Land Act, 1903, sect. 16, the Land Commission has power to make vesting orders, subject as therein mentioned, but save as to such exceptions, all superior interests must be redeemed, and the lands vested discharged from all claims in respect thereof. Such a right as that here in question does not come within any of the exceptions to which a vesting order may be made subject. It clearly does not come within clause (i), (ii), or (iii). It is not an "easement, right, or appurtenance" such as contemplated by sect. 34 of the Act of 1896, as that section deals with "holdings" of tenants only, and this was untenanted land. Sect. 34 was introduced into the Act of 1896 solely to oust the principle of *Bright* v. *Walker* (5). This

(1) [1892] 1 Ch. 475.
(2) L. R. 7 Ch. App. 456, at p. 465.
(3) 7 A. C. 633, at p. 648.
(4) [1914] A. C. 215.
(5) 1 C. M. & R. 211.

was a final offer case; but sects 43 and 90 of the Irish Land Act of 1903 leave the jurisdiction of the Land Commission with regard to vesting orders unaffected. It follows that the right (if any) of the plaintiff should have been redeemed as a superior interest, and the making of a vesting order containing such a reservation was ultra vires. The power, being a statutory power, must be strictly exercised, and a collateral agreement (even if there were evidence of such) to allow the plaintiff turbary rights would be wholly illegal.

The following cases and authorities were also cited and discussed: *Forster's Case* (1); *White's Estate* (2); *Erne's Estate* (3); *King Harman's Estate* (4); *Scott's Estate* (5); *Rutherford's Estate* (6); Dart's Vendor and Purchaser, p. 771; Smith's Leading Cases, vol. i., pp. 84–86.

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Feb. 4.

SIR IGNATIUS J. O'BRIEN C.:—

The value of the fee of the property on which the turf, the subject of dispute in this case, is to be cut is very trifling, and a County Court could, in some appropriate proceeding, have adjudicated on the rights of the litigants with great propriety, were it not that an issue of enormous general importance, to be found in the 12th paragraph of the defendants' defence, was raised, and that this issue, besides being most serious in its bearing on the administration of the Land Purchase Code, is also one of great difficulty. It is true that in the view which I take this issue does not ultimately arise as an essential ground of decision; but as the greater part of the time occupied in discussing the case has been devoted to this question, I have come to the conclusion that I ought to express an opinion on it. The view which has been put forward on behalf of the Congested Districts Board is one which, pursued to its necessary and logical conclusion, would upset the opinions which have prevailed since 1903 with regard to the effect of sect. 16 of the Land Act of that year; and while it would, if adopted, mean success for the defendants in the present case, it

(1) [1908] 1 K. B. 629.
(2) 40 I. L. T. R. 6.
(3) [1912] 1 I. R. 77.
(4) [1908] 1 I. R. 202.
(5) [1916] 1 I. R. 180.
(6) Unreported. Wylie J., 11th Feb., 1913.

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would affect rights which have been acquired since 1903 under vesting orders made by the Land Commission; it would result in the necessary destruction of these rights; and not only would it hamper the administration of the Land Purchase Code, but I am rather inclined to think it would, in some instances at any rate, create difficulties with regard to the acquisition of property by the Board itself.

By a vesting order, dated the 23rd November, 1912, the Land Commission vested in the Congested Districts Board a very large area of land in the County of Clare, part of the estate of George O'Callaghan Westropp. Amongst those lands, specifically described, was a small area of bog land, part of the lands of Fortanebeg, and on its face the vesting order is made subject to the turbary rights reserved to the occupiers of houses in Maryfort and Fortane by a conveyance made on the 23rd February, 1908. A disagreement arose, after the vesting order had been made, between Colonel Westropp, who was the owner of the two houses referred to, and the Congested Districts Board as to the extent of the rights reserved in respect to these bog lands; and the action is brought for a declaration of the plaintiff's alleged rights as reserved by the vesting order and for an injunction.

Whether the plaintiff or the defendants acted unreasonably or whether the former asked too much is in connexion with the present issue quite immaterial, because the defendants allege and strenuously contend that the Land Commission had no power to make any reservation such as that in question; and that as this was a case under the compulsory powers of the Land Act of 1909, and as the vesting order was made under sect. 16 of the Act of 1903, the Land Commission had no jurisdiction to mould the vesting order so as to include this reservation, and that the reservation is waste paper. With regard to some questions in this case there is no doubt, inasmuch as the evidence is documentary. The original certificate of prima facie title given by counsel on the 21st June, 1912, and lodged with the Land Commission, states that the lands are not subject to sporting, mineral, or water rights, and continues: —"Under the conveyance of February 23rd, 1908, a right is reserved to the occupants of the houses of Maryfort and Fortane to cut turf for use in such houses on the lands of

Fortanebeg." This came before the examiner, who noted this reservation.

On the 26th July, 1912, a document called Form M was issued by the Estates Commissioners. It provided that unless cause to the contrary was shown within two months, a vesting order would be made subject, inter alia, as to the lands of Fortanebeg to the turbary rights reserved to the occupiers of houses in Maryfort and Fortane by the conveyance of the 23rd February, 1908. This form was served on the Congested Districts Board. Under sect. 16 of the Act of 1903 any person interested in the land may within the prescribed time show cause against the vesting order being made. This is the time referred to in Form M.

On the 26th July, 1912, the Form was published in the *Dublin Gazette*. I may say, in passing, that if the contention of the Congested Districts Board be correct, such a proceeding would not be of much practical utility, because their argument is that, in a compulsory sale case at any rate, nothing can be reserved except what is authorized by statute, and that what is not reserved, so far as it is a right, is transferred to the purchase-money. Of course, apart from this contention, the object of the publication in the *Gazette* is to give an opportunity to persons who may be adjoining owners, and who may have known nothing of what was going on between the contracting parties, to appear before the Land Commission, to whom power is given to refuse to make the order, presumably if justice so requires. I use the expression "compulsory sale" in reference to cases of final offer accepted, which is the present case, even though the actual compulsory powers have not been used.

The vesting order in this case was sent in draft twice to the Congested Districts Board, and was approved, with the reservation in it, on the 8th November, 1912, and re-approved on the 15th December, 1912, by Mr. O'Connor, solicitor of the Board.

No cause having been shown by the Board—who could have shown cause if they were so advised—or by anyone else, the vesting order was duly made, and on the 5th December, 1912, the Form which is employed for declaring that all claims as against the land shall attach to the purchase-money was issued, saving this reservation. I do not myself attach much importance to this

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order transferring claims in so far as it affects any question of notice to the Board; but it is a fact not to be omitted from notice. Having regard to what took place, anyone interested knew that, whether this could have been treated as a superior interest or not, it was not intended that it should be so treated.

The vesting order was subsequently registered under the provisions of the Local Registration of Title Act; and so far as these documents, on the face of them, show anything, they show that the reservation was deliberately made with the full knowledge and approval of the Congested Districts Board; and, as between private individuals, one of the two parties to an equivalent transaction would not be permitted, after he had deliberately taken the property subject to a right reserved to the other party, to repudiate all liability in respect of it. The Congested Districts Board, however, do take up this attitude on the ground that they are a public body, whose powers and rights are controlled by statute; that the Land Commission could not legally have made any reservation, and that, consequently, it does not bind them. This point is distinct from another objection, namely, that the reservation itself is such that effect cannot be given to it. The objection affects the jurisdiction of the Land Commission. It has been submitted that the position taken up by the Congested Districts Board is a perfectly meritorious one, because the officers of the Board really never contemplated that they were buying subject to any such right; that, in the estimate which they made of purchase-money, they agreed to pay a price which seems to them to cover the acquisition of the bog without any reservation, and that, accordingly, there is nothing unfair or harsh in seeking to avoid, on technical ground, the obligations imposed by the order. The documents to which I have referred would absolutely deprive the Congested Districts Board of any such defence as a technical matter. It is possible, indeed probable, that the different officers of the Board, including Mr. O'Connor, did not exactly realize the position; but the conclusion I have come to, although it cannot affect the ultimate result, is that it was not the fault of Colonel Westropp if they did not advert to this question of reservation.

In April and June, 1911, two conversations undoubtedly took

place between the present plaintiff and officers of the Board, at which some reference at any rate was made to the necessity of having turf reserved for the two houses mentioned. If the evidence of the plaintiff is to be accepted the references were such as would leave no doubt on any person's mind as to his insistence upon the necessity of having an adequate supply of turf for these houses, or, at all events, for the house which was, at that time, occupied. On the whole, I am inclined to think that the recollection of the officers with regard to this matter is at fault; but I am satisfied that they did not deliberately or knowingly disregard anything which they remembered as having been fairly brought before them. They have hundreds of cases to deal with, and it would be an absolute impossibility for them to carry the details of every conversation in their minds. It is quite enough to say that, so far as the plaintiff is concerned, he did nothing, that I can see, which would have deceived the Congested Districts Board, or would give them any special merits in connexion with the case. It is not necessary to go into details of the evidence in this respect, as I do not think there is anything in it which technically can affect the position of the Board or of the plaintiff. Sir Henry Doran stated in reply to question 995 that it was not until he received a letter from Mr. O'Connor, the solicitor of the Board, that he knew of this reservation. As an individual it is quite likely that he never had regard to the matter in the legal light; but the fact that he did not advert to the form of the vesting order until this date cannot affect the question before us, which is one of law and of the construction of statutes.

The scheme of land purchase inaugurated by the Land Act of 1870 contemplated the acquisition of land by tenants by means of conveyance, and in some cases by purchases through the Landed Estates Court. The position of the tenant was regulated by the terms of the conveyance and the ordinary law with such added rights, e.g. those preserved by sect. 36, as were contained in the Act itself.

The Land Act of 1881, Part V, while extending the law with regard to land purchase and enabling estates to be purchased by the Land Commission for re-sale to tenants, still retained the ordinary procedure by conveyance. In the case of purchases of

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land, not necessary to be re-sold to tenants, they could re-sell to the public under sect. 27. Normally, sales of the latter class would deal with untenanted lands or, possibly, lands which, though tenanted, were not in the occupation of ordinary agricultural tenants. In proceedings by conveyance by the Land Commission, whether to tenants or other persons, any rights over the land could, within limits, have presumably been preserved; and certainly rights of adjoining tenants in respect of ways could have been reserved.

A great stride forward was taken in the Act of 1885, not only in respect of the powers of purchase and the jurisdiction of the Land Commission, but also in the introduction for the first time of what I may call a statutory conveyance. The great inconvenience of having a vast number of cases carried out by conveyances with mortgages of the property collateral, had become evident, and by sect. 8 of the Act of 1885 it was provided that where a holding was sold by the Land Commission to a tenant or other person or by a landlord to a tenant, the Land Commission might make an order vesting the holding in the purchaser. Sect. 7 of this Act somewhat extended the provisions of the Act of 1881 with regard to the sales of land not sold to tenants. Accordingly, after 1885, cases would arise of sale by the Land Commission to tenants and to non-tenants, carried out by vesting order; but, of course, this section is now repealed by the Act of 1903.

The next Act to be referred to is the Statute of 1887. This, for the first time, enabled the Land Commission, by sect. 14, sub-s. 1, to declare that the claims all persons "who are interested in the lands sold, whether as incumbrancers or otherwise, shall attach to the purchase-money." The section is confined to a case where a landlord and tenant had agreed for the sale of a holding; but the words I have quoted re-appear in subsequent statutes, and where a vesting order was employed to carry out the transaction, sect. 9 of the Act of 1885 could be applied so that a declaration might be made under the latter section preserving rights and easements affecting the holding.

Possibly some doubt was entertained as to the construction of the statutes, because in the Act of 1896 the provisions of the

earlier Acts affecting vesting orders were entirely recast. Sect. 9 of the Act of 1885, in so far as I have referred to it, was repealed; sect. 8, which dealt with the binding effect of vesting orders, was not touched, and a new group of sections, 31 to 34, was enacted. Sect. 31, sub-s. 1, opens by saying: "Where any land has been sold under the Land Purchase Acts as amended by this Act." I can see nothing in the section confining these words merely to cases of sales of holdings to occupying tenants. The words, "Where any land has been sold," appear to me to have been introduced deliberately to cover the case, not only of the sale of a holding to a tenant, but another class of transaction which might take place, namely, sales of parcels of land not re-sold to occupying tenants under the then existing Land Purchase Acts; also cases of lands sold by the Land Judge, the advances being made under the Land Purchase Acts, and proceedings under the Redemption of Rent Act, 1891, where a rent was redeemed. In place of an order attaching claims in respect of superior interests to the purchase-money, it is directed that the sale of the land is to be made discharged from all superior interests. We know that, notwithstanding the words of this and other sections in subsequent Acts, the Land Commission continued to make orders under sect. 14 of the Act of 1887. This course was, I think, quite right; as the object of sect. 31, sub-s. 1, was to deprive them of the discretion which they had under sect. 14 of the Act of 1887.

Sub-section 2 of sect. 31 of the Act of 1896 placed the subject of exceptions and reservations upon a clearer footing. There might be reserved out of a vesting order matters dealt with in the agreement for purchase or agreed to subsequently; but it may be said that sub-sect. 2 would not naturally apply to any case except an agreement between landlord and tenant. However, a construction of the section which would exclude the application of the sub-section to every class of land sold does not appear to me to be rendered more necessary on this account. Further, if such a construction were to prevail, it would lead to a strange anomaly, because when we come to sect. 32 we find that the Land Commission are to prepare the vesting order—the vesting order there referred to, obviously, to my mind, must mean an order which could vest any class of land capable of being dealt with, whether

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superfluous and possibly untenanted land or land in the occupation of a tenant. The Land Commission are bound by sub-sect. 2 to take steps for the registration of the title of the purchaser under the vesting order or fiat, as the case may be, and sect. 34 of the Local Registration of Title (Ireland) Act, 1891, is by sub-s. 3 extended to a vesting order or fiat as if it were the register created by that statute; but the jurisdiction given to the Court under sect. 34 of the Registration of Title Act is to be exercised by the Land Commission. Down to the present time it has been assumed that the obligations and jurisdiction conferred by sect. 32 of the Act of 1896 apply to all cases other than cases of final offer.

It has been the practice of the Estates Commissioners to draw a distinction between ordinary sales and final offer cases, but no regular judgment has been given; and Mr. Brown in his able argument urged that there was no essential difference, though alternatively he put the other case. My opinion is that there is no logical difference between the two cases.

Section 34 of the Act of 1896 deals with the question of reservation of easements and rights in phraseology different from that of the Act of 1887, but the effect is substantially the same. Sub-sect. 2 enacts that the vesting order may, if the Land Commission think fit, declare that the sale is made subject to or free from any particular easement, right, or appurtenance, "and such declaration shall have full effect." The object of these last words was to prevent any doubt arising from the otherwise drastic operation of a vesting order. This sub-section, as well as sub-sect. 2 of sect. 32, is, according to the argument of the Board, confined to the case of a holding vested in a tenant purchaser; but reading sect. 7 of the Act of 1885 with sub-sect. 1 of sect. 31 of the Act of 1896, I think that it is not unreasonable, as the law stood before 1903, to apply these provisions to every case of a vesting order.

When we come to the Act of 1903 and the great step in advance on the road to land purchase then taken we find that there was already in operation for many years a statutory form of conveyance known by the name of vesting order which, as I think, applied both to tenanted lands, and, in some cases, to untenanted lands; and it must be assumed that the existence of that form of conveyance was present to the mind of the draftsman

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of the Act of 1903. Part I of this Act is to be construed as one with the earlier Land Purchase Acts, with some of which I have been dealing. It is not always possible in tacking together, so to speak, the different sections of these various Acts to get as clear, grammatical, and harmonious results as might be expected in a homogeneous, new, and independent Act of Parliament; but, speaking for myself, I think we should, unless we are absolutely prohibited by the context from doing so, endeavour to discover and adopt a construction which will contribute to the smooth and harmonious working of this important code rather than lean towards a construction which prima facie would not only result in individual hardship, but which would largely operate against the smooth working of the statutes themselves. This would, I think, be the case if sect. 16 of the Act of 1903 was to be restricted in the way which the argument on behalf of the Congested Districts Board requires.

Many new provisions had to be inserted in the Act of 1903 to meet the altered condition of the law of land purchase. In the first place, purchases by the Land Commission and resales by them assumed proportions of great extent and importance. Not only were the Land Commission given powers to purchase "estates," whether the word be used in the popular or in the restricted sense in which it has sometimes to be applied in dealing with the Act of 1903; but they were given power under sect. 8 to purchase untenanted land. The resales were not necessarily to be made to tenants either of land occupied by them or of land which had formed part of their holdings: for instance, in the case of untenanted land acquired under sect. 8. Under sect. 2 what is described as "parcel of an estate" might be sold to persons who are not tenants of holdings, e.g., the son of a tenant of a holding on the estate and other persons specified in the section. Moreover, the Land Commission were empowered to purchase from the owner of an estate the demesne lands or other lands in his own possession and to re-sell the whole or part of them to him. In regard to all these dealings sect. 16 prescribed a vesting order for the purpose of vesting the estate in the Land Commission. Sect. 7 of the Act of 1885 was repealed, and I should be disposed to draw the inference that this would be the natural course when a tentative and limited

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provision was to be replaced by large and comprehensive sections under which resales could be made not only to tenants, but to those not in fact tenants, and to landlords. It has been contended that this section is self-contained—and in a sense that is so—because it provides that the vesting order shall discharge the land from the claims of all persons interested in it, whether in respect of superior or intervening interests or incumbrances or otherwise, and that, as from the date of the order, these claims shall cease to attach to the land; but, as I have said, it appears that the Land Commission have been in the habit, notwithstanding the apparently strong provisions of this section, of making orders attaching liabilities to land conveyed, similar to those in the present case. As a matter of practical procedure this course appears to them to be desirable; but whatever the effect of the last clause of paragraph (*d*) of sub-s. 1, the words in the earlier part of the same paragraph to the effect that the vesting order is to be subject to any easements, rights, and appurtenances mentioned in sect. 34 of the Act of 1896, has been hitherto deemed to justify that course.

The argument that each area of land purchased must be regarded, so far as adjoining owners are concerned, as a perfectly circumscribed unit unaffected by any rights of such owners, would, if adopted, lead, in my view, to confusion and hamper the operation of the Acts. Take, for example, the case of a mansion-house, so situated that access to it could only be had through the tenants' holdings, the argument is that these holdings or the lands comprising them are not affected by this right of way, and that it cannot be re-created if the mansion is re-sold to the landlord.

I have before me a vesting order in the case of the estate of the Earl of Arran, dated January 9th, 1913. It vests the estate in the Land Commission in fee-simple, subject to the reservation to the vendor, his heirs and assigns, his and their licensees and servants, of a right on foot, with horses and carts, between certain points marked on the map. But the main argument addressed to us on behalf of the Congested Districts Board would make this an illegal reservation. In the case of the estate of Charles Thompson, the vesting order made in July, 1913, also reserves a right of way over the lands vested in the Land Commission.

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I take these two cases as showing what has been the view of the Land Commission in the past, and what is, I think, the correct view at any rate in cases not being final offer cases.

It appears to me that sect. 16 cannot have been intended to deal solely with lands comprised in "holdings" which were purchased. The section was apparently intended to apply to vesting orders in regard to "land." Why should it be confined, as to the power to make declarations, merely to holdings and to claims of owners of holdings? It may be much more necessary to make such reservations where untenanted land or demesne land is purchased and vested in the Land Commission.

An examination of sub-sect. 2 of sect. 16 itself sustains the view I have formed. What would be the object of publishing advertisements, inviting the intervention of persons "interested in the land," and informing them that, in a proper case, they may show cause against the vesting order being made, if their attendance and opposition were to be merely ornamental? If there is no power in the Land Commission to limit the operation of the vesting order in a proper case, so as to keep alive rights of adjoining owners without having to cast a burden on the purchase-money by treating these rights as superior interests, it is difficult to see what purpose any person interested in the land could effect by showing cause. Certainly, if he showed that a grave injustice would be done to him by depriving him of access to his house or to the sea-shore or to other lands not forming part of the estate purchased, the Land Commission would have jurisdiction to refuse to make the vesting order; but I cannot conceive that the impossible situation was contemplated that all that could be done would be either to refuse to make the vesting order, thereby preventing the carrying out of the transaction, or to make an order which would be a violation of the most elementary principles of justice. The view that they can take an intermediate course and insert words preserving an easement or profit à prendre to other persons, gives, in my judgment, a reasonable construction to the section.

This does not, however, end our difficulties. The present vesting order is one which followed proceedings initiated under the compulsory purchase powers of the Congested Districts Board, and

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it arises under the Act of 1909. Dealing, first, with the case of the Land Commission, this Act gave power to the Land Commission to buy land, not situated in a congested districts county, for the purpose of relieving congestion. They are given power to purchase either a congested estate or untenanted land. Where an agreement is arrived at the land will be vested in them under sect. 16 of the Act of 1903; if no agreement is arrived at, the lands may be compulsorily purchased under Part IV of the Act; and in that event an order will also be made vesting the property in them. With regard to congested districts counties, the Congested Districts Board, and not the Land Commission or the Estates Commissioners, are the body who are given power to purchase. Under the Act of 1903, as amended by the Act of 1909, they also have power to purchase an estate or untenanted land; under the Act of 1909 they may make a final offer in writing for the purchase of an estate, and, if it is not accepted, the Board may take steps to acquire the lands compulsorily; and if so acquired, the estate is by force of sect. 79, sub-s. 1, of the Act of 1903 vested in them also under sect. 16.

An examination of the compulsory powers sections of the Act of 1909 now becomes necessary, having regard to the alternative argument put forward on behalf of the Congested Districts Board. Mr. Brown argued, and, I think, logically, that the result was the same, whether the vesting order was made after a purchase by voluntary agreement or after an agreement following on a final offer made under the compulsory purchase sections; but he presented an alternative argument to the effect that, although a special reservation might be possible in the case of a purely voluntary agreement, it was not possible in a case like the present. Although there has been no express decision on the point by the Judicial Commissioner, we have been informed that, as a matter of practice, this distinction has been observed by the Estates Commissioners, and it now becomes necessary to consider whether or not it really exists.

In this connexion we have been furnished with an order made in Rentoul's estate, dated the 7th May, 1917, where, in addition to the statutory reservations, there is expressly reserved to the persons entitled to certain lands of Ballyglass, which are not

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lands dealt with in the vesting order, such right to seaweed on the shore of the townland of Knocknalina, bounded as therein described, as was reserved in and by a partition order dated the 11th July, 1853. If there was no power in the case of partition orders to make these reservations, the result would be more than inconvenient—it would be an impediment to the operations both of the Estates Commissioners and of the Congested Districts Board. Partition, as a condition of disposing of part of an estate, becomes in many cases absolutely essential; and it would be practically impossible to carry out sales, where lands have to be partitioned, if all the rights of the lands partitioned but not vested, in respect of the lands partitioned and vested, were to be affected. But there is no distinction in principle between this case and the case of partitioned land. The still more interesting fact has been demonstrated to us, that in the particular case mentioned this reservation was deliberately written in and passed with the express approval, given on the 10th May, 1917, of the solicitor for the Congested Districts Board. It does not appear on the order whether the purchase was by voluntary agreement or was effected compulsorily; but as it was a transaction for cash, as distinguished from a stock transaction, it must have been a case under the compulsory powers sections. But in my view, and whether the order was good or bad, it shows how the argument of counsel for the Congested Districts Board, if yielded to, would not only destroy the force of the reservation in the present case, but the force of the reservation in at least one other case solemnly assented to by the Board, and it demonstrates the inconvenience of this present contention.

By sect. 60, sub-s. 2, of the Act of 1909 the provisions of Part II of that Act with respect to the acceptance of a final offer sent by the Estates Commissioners "shall apply in the case of the acceptance of a final offer sent by the Congested Districts Board, but with the substitution of sect. 79 of the Act of 1903 for sect. 17 of that Act." I do not accede to the argument that this affects the jurisdiction of the Land Commission one way or the other with regard to the vesting order. The final offer sent either by the Estates Commissioners or by the Land Commission under sect. 43, sub-s. 2, is made expressly subject to the rights specified in

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(i), (ii), and (iii) of par. (*b*); and save as to these, the offer is made on the lines of the lands or estate being discharged from the claims of all persons interested in the estate or untenanted land. Clause (iii) is identical with sect. 16 (*d*) of the Act of 1903 in its reference to the Act of 1896. The offer precedes the contract in every case. If it is accepted, it shall have the same effect as an agreement for purchase under the Act of 1903, and the like consequences shall ensue and the like proceedings shall be carried on as in the case of such agreement: sect. 43, sub-s. 3. If the offer is not accepted, the machinery of sect. 61 is set in motion. In the result the estate or untenanted land is purchased compulsorily; but the vesting is made under sect. 16 of the Act of 1903, and I think that whatever powers are given in the one case must be given in the other, and if such a restriction is bad in one case, it must be bad in the other. Further, I am of opinion that, for the purposes of this case, there is not any difference between the final offer voluntarily accepted and that accepted under compulsion, but strictly I deal only with final offers accepted. The offer in each case names a price, and also provides for the reservation of easements whatever they may be. The like consequences are to ensue and the like proceedings are to be carried on after acceptance has been compulsorily enforced on the owner as in the case where the owner agrees to accept the offer, and the easements which are saved in each case are the easements dealt with in sect. 34 of the Act of 1896. Accordingly, I cannot see any ground, so far as the question at issue here is involved, for differentiating between compulsory and voluntary purchase. We are in each case thrown back upon sect. 16 of the Act of 1903 and sect. 34 of the Act of 1896 to discover the effect of the vesting order.

Mr. Brown has taken the logical course of not basing his case on any supposed distinction between contract cases and final offer cases. I am quite satisfied that for the purposes of this case no distinction can be drawn. The acts in the past of the Land Commission and the Congested Districts Board, as shown by the orders to which I have referred, are either all good or all bad. The same process of reasoning which has satisfied me that the vesting order under section 16 of the Act of 1903

may be modified with reference to sect. 34 of the Act of 1896 in the manner I have indicated, applies to sect. 43, sub-s. 2 (b), (iii), of the Act of 1909. Whatever force the words have in one case, they have also in the other; and the argument based on sect. 16, sub-s. 2, becomes all the more striking when it is considered that, according to the view presented by the Board, there would be nothing for the sub-section to operate upon. My opinion, therefore, is that there was jurisdiction in the Land Commission in this and in all the cases which incidentally have been brought under our notice, to add to the reservations expressly specified, the reservations in respect of adjoining owners which have been in fact made; and subject to correction by a superior tribunal, I venture to think that this construction is not only reasonable in itself, but essential to secure the effectual and harmonious working of the Land Purchase Code, whether the proceedings be based upon voluntary agreement or upon compulsion. This disposes of the only question which makes the present case one of serious importance.

I now come to the question of the construction and effect of reservation. I do not derive any assistance from the cases referred to by Mr. Justice Barton, inasmuch as they all deal with rights of common; they do not rest, as I apprehend, upon the same basis as that on which the question of a reservation, or rather re-grant, of a profit à prendre has to be considered, but in the result I am forced into agreement with his decision.

The contention of the appellant I understand to be this: that this deed operated as a re-grant of a profit à prendre so far as there was any bog left to satisfy its requirements, and that it must be taken to be something in the nature of a grant to Colonel John O'Callaghan, his heirs and assigns, in respect of the lands on which the mansion houses at Maryfort and Fortanebeg stand—a right capable of passing, inter alia, to any person who should at any time reside in these houses, presumably by force of an assignment to be made by Colonel John O'Callaghan, his heirs and assigns, from time to time. To read the clause in this way requires an amount of re-adjustment which I am unable to make. The document was obviously drawn by someone who appreciated the meaning and effect of technical language, and he

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has carefully abstained from constructing a clause anything like that which would be necessary to give effect to this part of the appellant's contention. He has deliberately attempted to reserve something, whatever it may be, in form at any rate, not to those who would have an estate in the lands, but merely to the person or persons who should, at the date of the deed, or at any future time, reside in either of these two houses.

So far from reserving or granting a right dependent on an interest in these lands, the language employed deliberately excludes such a right, and if the grant is to be taken as a reservation in gross, it is to my mind plainly uncertain, so uncertain that it is quite impossible to give legal effect to it. Anyone might fulfil the condition of a resident. A trespasser might reside in the houses just as well as a lessee of the owner in fee; but if the words are to be taken as they stand, they would include a succession of trespassers. The lands of Fortanebeg have been untenanted for very many years. There may never be another resident in them, or they may not have a resident until some future and remote date. It is impossible, in my opinion, to construe this clause as being an effective grant of a profit à prendre which could operate in the manner suggested and argued.

Authorities do not help me very much, and my impression is that the person who framed the clause did not have in his mind anything so abnormal and extraordinary as this kind of perpetual right, which I conceive to be clearly void. Such a clause, however, although inoperative and unenforceable according to the law, might have had a certain operative effect as a contract between the parties to it, viz., Colonel O'Callaghan, deceased, and the Board, in which case it would be a perfectly good and enforceable contract so long as the immediate parties to it existed; but Colonel O'Callaghan is dead, and I am unable to give even the most limited effect to the clause.

If the agreement is to be treated as being valid, the only person who could take advantage of it was Colonel John O'Callaghan; and all that was reserved—if anything was reserved by the vesting order—has disappeared by reason of the death of the person who could have taken advantage of it.

I had thought at one time that possibly the vesting order might have been in some way construed to give to the plaintiff himself some quasi contractual right, but I am unable so to construe it. This view, even if it were right, would be of little practical use to him, and it is clear that he has not brought this action for such a purpose.

RONAN L.J. :—

The statement of claim in this action claims a declaration "that the said bog of Fortanebeg is held by the defendants under the said vesting order subject to the right of the person or persons who now, or at any future time, shall reside in the mansion house of Maryfort (now Lismehane) or Fortane, of cutting turf on the said bog, such turf to be used exclusively for consumption in the said mansion houses of Maryfort and Fortane, and to include a reasonable right of access to the said bog for the purpose of exercising such right of turbary as in the said indenture excepted and reserved." The remaining paragraphs of the prayer are all consequential on this declaration. The clause in the vesting order referred to in the prayer is set out in paragraph 7 of the statement of claim, by which it is alleged that the Irish Land Commission vested in the defendants, inter alia, the lands of Fortanebeg, and the bog of Fortanebeg adjoining, "subject to the turbary rights reserved to the occupiers of houses in Maryfort and Fortane by a conveyance dated the 23rd day of February, 1908." By paragraph 2 of the defence the defendants plead that the reservation in the said indenture of the 23rd February, 1908, "could only confer a right of turbary on the person or persons then in fact residing in either of the said houses during his or their lives, and while residing therein respectively, or in the alternative the defendants submit that the said reservation was void and inoperative as creating a perpetuity."

It is obvious that if this submission is correct it disposes of the whole case, and that the plaintiff is not entitled to the declaration asked for, or any declaration of a like nature.

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Barton J. has held that the submission in paragraph 2 of the defence was correct, and dismissed the action.

Paragraph 5 of the statement of claim alleges a contract in these terms: —"In or about the month of May, 1912, the plaintiff agreed with the defendants for the sale to them pursuant to the powers vested in them by the Irish Land Acts, 1903 and 1909, of, inter alia, that part of the said lands of Fortanebeg which was in the occupation of tenants, and also the said bog of Fortanebeg in fee-simple, subject, inter alia, to the turbary rights reserved to the occupiers of houses in Maryfort and Fortane by the conveyance of the 23rd day of February, 1908." It is again obvious that if paragraph 2 of the defence is established, the words "subject, inter alia, to the turbary rights," &c., were absolutely inoperative.

Paragraph 12 of the defence is as follows: —"For a further defence the defendants will submit that the said vesting order in so far as it purports to declare that the lands of Fortanebeg thereby vested in the defendants are 'subject to the turbary rights reserved to the occupiers of houses of Maryfort and Fortane by a conveyance dated the 23rd day of February, 1908, is ultra vires and of no effect.'" It is plain that if paragraph 2 of the defence is established the declaration in the vesting order is of no effect. There is the further question as to its being ultra vires, and that is, I think, the main question with regard to which I am disposed to differ from the Lord Chancellor and from Barton J.

It is much to be regretted that the parties did not apply to have the questions of law raised in paragraphs 2 and 12 of the defence decided in the first instance. This would have saved the bulk of the expense incurred, and most of the time occupied in the case. However, the plaintiff was the dominus litis, and must take the consequence of not having done this. In my opinion the submission in paragraph 2 of the defence is well founded. As we are deciding the case on this ground, I shall say a few words on the subject.

There is no question of custom or prescription in this case. The right claimed is a profit à prendre. It is elementary law that such a right cannot be claimed by custom. The right here is not claimed by prescription. It is claimed under a formal deed, not an executory instrument. The clause in the vesting order

is "subject as to the lands of Fortane Beg to the turbary rights reserved . . . by a conveyance dated the 23rd February, 1908." The clause is set out at paragraph 3 of the statement of claim.

I am of opinion, for substantially the reasons stated by Barton J., that such a grant is void, at all events so far as it purports to operate in favour of persons not residents at the date of the deed. It is an attempt to turn the successive residents in each house into a sort of corporation. It seems to me that the statement of the law by James L.J. in *Commissioners of Sewers* v. *Glasse* (1) is conclusive as to this, viz.: "Of course it is settled and clear law that you cannot have any right to a profit à prendre in alieno solo in a shifting body like the inhabitants of a town or the residents of a particular district." The observations of Mellish L.J. in this case cited by Barton J. do not deal with the construction or effect of an existing deed. They deal with the allegations of "enjoyment as of right" in the 12th paragraph of the bill in that suit, which will be found at p. 450 of the Report in 7 Ch. App.

Actual enjoyment as of right may be used for the purpose of prescription or the presumption of a lost deed which would give such enjoyment a legal origin. The Courts have gone far in presuming such deeds. The case which has gone farthest in this direction is *Goodman* v. *Saltash* (2), where the House of Lords introduced the principle of trust into what I may call the imaginary deed; but, as Lord Selborne points out at p. 647, this principle has no application whatever when the actual deed is forthcoming. I am unable to follow the judgment of Barton J. dealing with rights of common, custom and prescription. In the present case there is no question of custom or prescription or of presumption of a deed. The only question is the effect of a specific clause in a deed of the year 1908. It is not an executory instrument. It must be taken as it stands. It seems to me to come within the very words of Lord Cairns' judgment in *Goodman* v. *Saltash* (2), p. 648, "and I think it also clear that a fluctuating and uncertain body cannot claim a profit à prendre in alieno solo, and indeed cannot be the grantee either of a several fishery" (a profit à prendre), "or of any other kind of real property." I have

(1) L. R. 7 Ch. Ap. 465. (2) 7 A. C. 633, at p. 648.

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quoted these authorities as the question has been gravely argued, but they seem to me only to state what has always been recognized as law. Barton J. decided the case on this ground, and none of us has any doubt that his decision should be affirmed on this ground, which of course disposes of the entire case.

At the dates of the deed and vesting order there was no resident in one house; and the resident in the other house at the date of the deed had died prior to the vesting order. The words "subject to the turbary rights reserved by the conveyance of the 23rd February, 1908," were therefore absolutely inoperative, as there were no such rights in existence at the time.

Serious questions on the Land Purchase Acts have, however, been elaborately discussed before us on the assumption that there was in this case a valid subsisting profit à prendre consisting of a right to take turf by an owner of lands adjacent to those sold.

Prior to the Act of 1909 there existed under the Irish Land Code extensive compulsory powers of purchase of certain interests in lands and rents. These powers were called "Redemption of Superior Interests." These powers did not extend to the estate of "the landlord" as defined in the Acts. In the Act of 1909 for the first time wide powers of compulsory purchase of the estates of landlords were given to the Land Commission and to the Congested Districts Board. The powers given to the two bodies are identical so far as is material to the present case. The procedure is also identical. The Land Commission or the Congested Districts Board make what is called "a final offer" to the person who appears to be the owner. If he accepts it, certain consequences ensue; if he fails to accept it, the Land Commission in both cases proceed under Part IV of the Act to acquire the property compulsorily. The final offer is the foundation of the entire proceeding. Sect. 60 of the Act deals with the Congested Districts Board; sect. 43 with the Land Commission. As in the present case the final offer was accepted, these are the sections with which we are chiefly concerned. Sect. 60, however, is not a self-contained section. It provides that the provisions of sect. 43 as to what the final offer shall contain, and as to the consequences of its acceptance, shall apply in the case of the acceptance of a final offer sent by the

Congested Districts Board. We are, therefore, driven to sect. 43 to ascertain these matters. Both these bodies are statutory corporations with limited powers; but in this matter their powers are identical. The simplest mode of dealing with the question is to treat the final offer as sent by the Land Commission under sect. 43. The conditions precedent to sending the offer are practically identical in sects. 60 and 43. They are substantially that the parties have failed to agree for the purchase of the lands. I need hardly point out that in a proceeding which is the basis of compulsory purchase the provisions of the statute must be strictly followed, and the powers are confined to those given by the statute.

Section 43 (1) is as follows:—

Where negotiations have been entered into or proposals have been made for the purchase under the Land Purchase Acts of any congested estate or untenanted land not situated in a congested districts county and no agreement has been arrived at, the Estates Commissioners may, if in their opinion it is desirable that the estate or untenanted land should be purchased for the purpose of relieving congestion, send in the prescribed manner to the person who appears to them to be the owner a final offer in writing for the purchase of the estate or untenanted land.

The final offer in this case recites that no agreement had been come to. If an agreement had been come to, there would have been no power to make it.

Section 43 (2) is as follows:—

The final offer shall contain the following particulars:—

(*a*) A description of the estate or untenanted land to which the offer relates;

(*b*) The amount of the price which the Estates Commissioners are willing to give for the estate or untenanted land, subject—

(i) to any public rights affecting the estate or untenanted land;

(ii) to any maintenance charges under the Public Works Acts; and

(iii) in the case of an estate, to any interests of the tenants or of persons having any claims upon those interests, and to any easements, rights, and appurtenances mentioned in section thirty-four of the Act of 1896:

but save as aforesaid, and subject to the provisions of the Act of 1903 with respect to minerals, discharged from the claims of all persons who are interested in the estate or untenanted land, whether in respect of superior or intervening interests or incumbrances or otherwise; and

(*c*) The time within which the offer may be accepted.

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This is mandatory. It will be observed that 2 (*a*) specifies "a description of the estate or untenanted land," not the estate or interest therein to be sold. This is provided for by 2 (*b*) (i., (ii), and (iii), and the final clause.

The section has been strictly followed in the present case, assuming that both tenanted and untenanted land can be included in one final offer at a lump price. The language of the sub-section is in the alternative, "estate or untenanted land"; but provided they can be distinguished in the final offer, I think it would be very inconvenient to hold that when an estate included untenanted land two final offers would be necessary. It is plain, however, that in the section there is a clear distinction drawn between "estate" and "untenanted land," and that "estate" means "tenanted land" as distinguished from untenanted.

The contents of a final offer are different in the case of "untenanted land" from those in the case of "an estate." Clause (*b*) (iii) is omitted in the case of untenanted land, because it only refers to the tenants' interests, and there are no tenants in such a case. The final clause is what really defines the interest sold. In the case of untenanted land it is discharged from the claims of all persons except—1, the public; 2, the Board of Works; 3, the owners of minerals.

It is obvious that the portions of the final offer contained in sub-s. 2 (*b*) (i), (ii), and the final clause, apply to every case of tenanted and untenanted land, and these with (*b*), (iii) apply to tenanted land only. In other words, the form of the final offer is fixed by the statute. The only items to be added by the parties are the price and the description of the lands. There is no discretion or power to depart from the provisions and terms of (*b*) i., (*b*) ii), (*b*) (iii), and the final clause. Even when the final offer is not accepted and compulsory proceedings are taken, the Judicial Commissioner can only amend it by striking out or adding lands: sect. 62, sub-s. 2; and the only other amendments are "consequential" on these: sect. 62, sub-s. 3. These all relate to sect. 43, sub-s. 2 (*a*). There is no power to amend any part of what is required by sect. 43, sub-s. 2. (*b*) It must be either accepted unconditionally or not accepted; it cannot be accepted with a variation. It is obvious that a final offer for

lands subject to a head rent, to a mortgage other than a Public Works charge, to an easement or to a profit à prendre other than the rights of the public, would be wholly inconsistent with the mandatory provisions of the section, and would be wholly ultra vires; and that any exercise of compulsory powers on foot thereof would be void.

Subject to what I have said as to including in one final offer tenanted and untenanted lands, the final offer in this case is in strict accordance with the statute. If the two classes are included in one final offer, it must be read as applying to each class the portion made applicable thereto by the statute. Among the lands comprised in the final offer in this case was the bog of Fortanebeg, untenanted land, the land with which this action is concerned. Let us suppose that the final offer was confined to the bog of Fortanebeg. This was untenanted land as distinguished from an estate. What should the final offer contain under sect. 43?

(*a*) Description of untenanted land;
(*b*) Price for the untenanted land, subject—
(i) to any public rights;
(ii) to Public Works charges;
(iii) [omit because it applies in the case of an estate only];

but save as aforesaid, and subject to the provisions as to minerals contained in the Act of 1903, discharged from the claims of all persons who are interested in the untenanted land, whether in respect of superior or intervening interests or incumbrancers or otherwise."

This demonstrates that the final offer could not be applied to untenanted land subject to private rights of turbary. It would not in such case be discharged from the claims of all persons other than those excepted by the final clause.

In this case the final offer was unconditionally accepted. The effect of this acceptance is specifically defined by sect. 60, sub-s. 2, by reference to sect. 43 thus:—"The provisions of Part II of this Act with respect to the acceptance of a final offer sent by the Estates Commissioners shall apply in the case of the acceptance of a final offer sent by the Congested Districts Board, with the

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substitution of sect. 79 of the Act of 1903 for sect. 17 of that Act." (Sect. 17 is the section enabling the Estates Commissioners to deal with persons showing prima facie title as owners. Sect. 79 enables the Congested Districts Board to act on the certificate of the Estates Commissioners as to prima facie title.)

What is the effect of the acceptance? Sect. 43, sub-s. 3, is the provision of Part II of the Act of 1909, referred to in sect. 60. The material words are—"The offer and acceptance shall . . . have the same effect as an agreement for the purchase of the estate or untenanted land under the said Act" (that of 1903), "as amended by this Act; and the like consequences shall ensue and the like proceedings shall be carried on as in the case of such an agreement, save that the advance for the purpose of the purchase . . . shall be made by means of money and not by means of stock, except" where the vendor agrees to accept 3 per cent. stock of the same nominal amount.

The language is remarkable. The offer and acceptance are not made an agreement; they are to have the same effect "as an agreement . . . and the like consequences shall ensue, &c., as in the case of such an agreement." The meaning of this is plain. It is an offer accepted under the threat of compulsory proceedings if not accepted. It is like an offer made by a man with a pistol in his hand not to shoot if the other parts with his property on terms which he does not like. The offer and acceptance are not an agreement within the meaning of the Act, though they are to have the same effect. In my opinion, a man would not be bound by the acceptance of a void final offer. Its acceptance being obtained by pressure of compulsory purchase would not constitute an ordinary contract. What is the agreement referred to in the section as "such an agreement"? It is plainly for the purchase of the interest in the property described in the offer at the price there mentioned. What are the effect and consequences? That the purchase-money is lodged in the Land Commission, to be paid to the persons who establish their title and claims to the land sold, and the Land Commission or Congested Districts Board can have a vesting order vesting the property in them when they please. This substitution of money for Stock was plainly intended as a solatium for compulsory purchase, and as an inducement to

owners of estates to accept final offers. It is regarded as a most valuable provision by owners of estates, but it is not open in cases of ordinary voluntary contracts. It only applies in cases of final offers. It follows, as the Act says, the acceptance of a final offer; and, in this case, the consideration in cash has been lodged.

The contract stated in the statement of claim is not the agreement stated in the final offer; it is an agreement to sell the bog, subject to a right of turbary in a third person. This could not be the subject of a final offer, or for a purchase under the Acts for cash as distinguished from Stock. Further, if the parties had agreed as to the terms of sale, there would have been no power to send the final offer, and the recital to the contrary in the final offer would have been contrary to the fact. If the truth had been told, the final offer would have been void on its face.

It is obvious that a vendor with a view to obtain this advantage of cash may refuse to enter into a voluntary contract, and wait for the final offer and then accept it. But if he does, he must take the final offer and its acceptance with all their consequences. If there was a real consensual contract differing in its terms from those created by the acceptance of a statutory final offer, it would, in my opinion, be a clear violation of the provisions of the Act to use the final offer procedure for carrying out the consensual contract, and thereby to obtain cash for the purchase-money. To test the matter simply, I shall assume that the bog of Fortanebeg was alone the subject of the final offer, that the price was £1000, and that the final offer followed the statute as it did in this case.

Then the consideration for the £1000 cash would be the bog in fee-simple, subject only to the claims in sect. 43, sub-s. 2, of the Act of 1909, and discharged from all other claims. It was the statutory duty of the Congested Districts Board, and of the Land Commission, to see that this was carried out. It would be a breach of duty on the part of the Land Commission to make, or on the part of the Congested Districts Board to accept, a vesting order which gave them less. £1000 cash, public money, of which they were trustees, was the price of the bog, discharged from all rights of turbary. They had no right, once the final offer procedure was adopted, and the final offer accepted, to make the vendor or anyone else a present of turbary rights over lands

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which they had purchased for public purposes, with public money, discharged from any such rights. If any attempt were made to induce a person to accept a final offer by making a contract with him to take less than the subject of the final offer, or to give an additional consideration, such a contract would, in my opinion, be void and ultra vires. I make this observation because it was suggested during the course of the argument that it would be open to the Land Commission or the Congested Districts Board in cases of final offer, to have a private arrangement with a party, that, although they acquire the land under the terms of the final offer, free from turbary rights, they might privately give back to such party the turbary rights or some part thereof. Such a transaction, in my judgment, would be illegal, and contrary to the provisions of the statute. It would be entirely without consideration, and would amount to the making a present of property bought with public money for public purposes.

In my opinion, both parties are bound by the rental in the final offer, and there is no evidence of any contract by the Congested Districts Board other than the statutory contract created by the operation of sect. 43, sub-s. 3, on the final offer and its acceptance. There is no agreement in the ordinary meaning of the word, and the sole power to make a vesting order in the case of an accepted final offer arises from the words in sect. 43, sub-s. 3, "and the like consequences shall ensue, and the like proceedings be carried as in the case of such an agreement." I think it plain that the Land Commission have only the same powers in respect of a vesting order in the case of a purchase by the Congested Districts Board as they have in the case of a purchase by themselves. I shall, therefore, continue to deal with the case under sect. 43 as if it were the case of a purchase by the Land Commission. It is plain that the terms of the final offer in sect. 43 of the Act of 1909 are taken from the provisions as to vesting orders in sect. 16 of the Act of 1903, and that the final offer is so framed as to enable it to be carried out by a vesting order under sect. 16. Clause (*b*) (as to sporting rights reserved by the vendor) in sect. 16 is omitted in sect. 43, because no such rights are reserved in the case of a final offer. Apart from this, the descriptions of the interests in

the land to be purchased are identical. In both it is "discharged from the claims of all persons" except those specified. Sect. 16 does not distinguish between tenanted and untenanted land. It simply says "any land," and "land purchased." It does not, consequently, confine clause (*d*) to tenanted land, as is done by the corresponding clause (iii) in sect. 43. The omission clearly shows that clause (*d*) in sect. 16 only refers to the tenants' interests and easements, &c. Clause (*d*) is plainly necessary in the case of tenanted land, as, in that case, the reversion on the tenants' interests is alone the subject-matter of the purchase.

To avoid repetition (and not as citing an authority) I would refer to my judgment in *Scott's Case* (1). [His Lordship read from the words "This was the position" (p. 216) to the words "and remain outstanding" (p. 218).] I did not there refer to the sections of the Act of 1896 relating to vesting orders. I have made a minute examination of those sections.

Vesting orders first appear in the Act of 1885. Sect. 5 enables the Land Commission to purchase estates for the purpose of re-selling to the tenants their respective holdings, and to purchase any holding for the purpose of re-selling it to the tenant of the holding. "Holding" is defined in sect. 57 of the Act of 1881. Part VII of that Act, which contains sect. 57, is included in the expression "Land Purchase Acts," by force of sect. 42 of the Act of 1891. Sect. 6 of the Act of 1885 does not touch the present matter. Sect. 7 is repealed by the Act of 1903. We have "estates" and "holdings" contrasted in the strongest way in sect. 5. "Parcel of land" is included in the holding under this definition. Sect. 8, creating the vesting order, is beyond doubt confined to orders vesting the holdings, and does not extend to estates. It may be made subject to any charges, rights, or easements specified in the order. The effect of the order is to be that of a Landed Estates Court conveyance; and the section is expressly made applicable to "an interest in a holding." Sect. 14 of the Act of 1887 is confined to sales of holdings. It enables the order to be made attaching all claims to the land (except those of the tenant and those claiming through him) to the purchase-money, and to cease as against the land. The Redemption of Rent Act of 1891 is

(1) [1916] 1 I. R. 180.

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confined to holdings (sects. 1 and 2). It is plain that down to the Act of 1896 vesting orders were confined to holdings (including parcels of land), and did not extend to estates. Part III of that Act deals further with vesting orders inter alia. It consists of eighteen sections, 25 to 42. The word "estate" only occurs in sect. 40; but even there it is confined to "an estate comprising holdings to which this section applies," and it is with the sales of these holdings the section deals. However, sub-sect. 2 provides that "any person in occupation of and paying rent for a parcel of land (including the owner of an estate in occupation of a mansion house or demesne forming part of the estate) held under a letting by the Land Judge or Receiver Judge, may agree to purchase such parcel of land, and the same shall be deemed a holding and such person a tenant, and the Land Judge or Receiver Judge, as the case may be, a landlord within the meaning of the Land Purchase Acts." This is the only reference to "estate." There is no reference to the purchase of an estate by the Land Commission or anyone else.

Sect. 25 of the Act of 1896 (the first section of Part III) seems to me to indicate the subject-matter of the entire. Sub-sect. 1 provides:—"In the case of every advance under the Land Purchase Acts made after the commencement of this Act the purchase annuity shall be calculated," &c. Sect. 28 abolishes purchaser's insurance money "in the case of any advance . . . for the purchase of a holding." Sect. 31 is the only section that could possibly extend the vesting order provisions to the case of a purchase of an estate by the Land Commission. The section, sub-s. 1, uses the words—"Where any land has been sold under the Land Purchase Acts." These words if they stood alone might include the purchase of an estate, but the sentence does not end there; it proceeds—"And an advance under the Land Purchase Acts is made for the purpose of such sale." Sect. 25 has already the words "every advance . . . the purchase annuity." Therefore, "land" is confined to land in respect of which an annuity is payable, i.e., a holding, or what is deemed a holding. But further—and this appears to me conclusive—where the Land Commission purchase an estate there is no advance; therefore, sect. 31 of the Act of 1896 cannot apply to

such a case. It is true that in the case of the Congested Districts Board there is an advance, but, for the reasons I have given, it seems to me impossible to hold that the powers of the Land Commission are greater in such a case than in the case of a purchase by themselves. But the matter does not stop there. Sect. 31, sub-s. 2, says :—"A vesting order shall be subject to such exceptions and reservations as are specified in the order if they were contained in the agreement for purchase, or subsequently agreed to by the vendor and purchaser." The reservation in this case was not contained in the agreement (the accepted final offer). There is no evidence of any subsequent agreement by the statutory corporation, the Congested Districts Board. Their solicitor had no power to make a contract on their part. And even if there was such a subsequent agreement by the Board, it would, in my opinion, have been void—(*a*) not being under seal, (*b*) without consideration, and (*c*) ultra vires, as inconsistent with the statutory provisions as to final offer.

The Redemption of Rent Act cases are all cases of holdings: see sects. 1 and 2 of that Act. Sect. 31, sub-s. 2, of the Act of 1896 simply regulates vesting orders. It does not give power to make or authorize them in cases where they did not already exist. Sub-sect. 4 is expressly confined to sales of holdings. Sects. 32 and 34 seem to me to put the matter beyond doubt. Sect. 32, sub-s. 1, provides—"The Land Commission shall prepare the vesting order, or, if they see fit to dispense therewith, shall fiat the agreement for the purchase of the holding." Sub-sect. 2 provides—"The Land Commission shall, immediately after the vesting order or fiat, prepare and transmit to the registering authority under the Local Registration of Title (Ireland) Act, 1891, the prescribed particulars as to the holding," &c. Sect. 34 provides—1. "A holding vested in a purchaser by a vesting order under this Act shall continue to have appurtenant thereto and to be subject to," &c.

Prior to sect. 16 of the Act of 1903 the Land Commission had, in my opinion, no power to make a vesting order vesting an estate in themselves, or in the Congested Districts Board. The only power they now have is under that section. It purports to apply to every case of purchase by them; but it only enables them to make the vesting order described, and having the effect

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stated in the section, that is, discharged from the claims of all persons other than those excepted. Its operation is, in my opinion, identical with what I have already attributed to the same provisions in the final offer. The vesting order cannot be made subject to rights or estates of any persons other than the excepted persons, viz., the public, the owners of the public works and charges, and the tenants' interests and easements.

There is one very important matter I overlooked in *Scott's Case* (1). The final clause of sect. 26 of the Act of 1881 enabled the Land Commission to purchase *an estate* subject to "any right, title, or interest adverse to or in derogation of the title of the vendor," but only "if satisfied with the indemnity or terms offered or given by the vendor"; and it is provided that "the Land Commission may indemnify any person to whom they may sell any holding under this section against any such incumbrance or the enforcement of any such right, title, or interest, and such indemnity shall be a charge on the Consolidated Fund, or the growing produce thereof." This is inconsistent with the view that they must get the absolute fee-simple. It enabled them to take an estate subject to a head rent or an easement or profit à prendre with an indemnity or on terms. Such a provision was necessary so long as they had no power to acquire the fee by a vesting order. It remained in force down to the Act of 1903. Sect. 16 of that Act made it unnecessary, and bound them to obtain the fee, and accordingly this provision was specifically repealed by that Act (sect. 103 and schedule). This seems to me a strong confirmation of the view that the Land Commission must now purchase the fee subject only as in sect. 16, and that they had no power to make an order vesting an estate in themselves prior to that section. After a careful and minute examination of the sections I have arrived at the conclusion that the 12th paragraph of the defence, which I have already read, is well founded.

Mr. Justice Barton was of a contrary opinion. He is not very explicit on the point, but I think he must have meant that clause (*d*) in sect. 16 would extend to easements, &c., of outsiders. I must point out first that clause (*d*) is printed in a misleading form at p. 1079 of Mr. Maxwell's work. In the

(1) [1916] 1 I. R. 180.

Statute Book clause (*d*) ends with the words "Act of 1896." The portion beginning with "but save as" is a separate independent clause. The print of sect. 43 at p. 1227 of Mr. Maxwell's work is correct. This materially alters the effect of sect. 16, because the misprint makes it appear as if the words "discharged from the claims of all persons," &c., formed portion of clause (*d*).

In the next place, clause (*d*) in sect. 16, being identical in terms (except in one particular) with clause (*b*) (iii) in sect. 43, must have the same meaning. The particular I refer to is the addition of the words "in the case of an estate" in sect. 43, sub-s. 2 (iii).

But these words confining the clause to tenanted land, and providing for its omission in the case of untenanted land are conclusive evidence that the only estates or interests or easements or rights comprised in it are those of tenants. Indeed, apart from this, I never could see how it could be contended that the rights mentioned in sect. 34 of the Act of 1896 could be anything but rights of a tenant attached to his holding. The sole object of the section was, as Walker C. and Holmes L.J. pointed out in *King Harman's Estate* (1), to get rid of the doctrine of *Bright* v. *Walker* (2).

The whole scope of sect. 16 of the Act of 1903 and sect. 43 of the Act of 1909, coupled with the repeal of the final clause of sect. 26 of the Act of 1881, seem to me to demonstrate that the subject of a final offer cannot be lands or an estate subject to a right or easement vested in a third party other than those specified in sect. 16 and sect. 43, and that these do not include such a right as that mentioned in par. 5 of the statement of claim or in clause (*b*) of the vesting order in this case. The vesting order must, in my opinion, have the effect given to it by the express words of sect. 16, sub-s. 1, of the Act of 1903, that is, to "vest in the Commission the fee-simple of the land purchased" subject only to the matters stated in the sub-section, and discharged from all other claims. The object of sect. 16, sub-s. 2, is plainly to enable persons claiming easements, profits à prendre, or other interests in the land to prevent an order being made which would destroy their interest in the land, and only leave them a claim against the purchase money.

(1) [1908] 1 I. R. 202. (2) 1 C. M. & R. 211.

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MOLONY L.J.:—

By indenture, dated the 23rd day of February, 1908, and made between John O'Callaghan of the one part and the plaintiff of the other part, the lands of Fortanebeg, and also the bog of Fortanebeg adjoining the said lands, were (inter alia) granted to the plaintiff in fee-simple, subject to a reservation in the following terms:—"Excepting and reserving out of the said bog of Fortanebeg to the person or persons who now or at any future time shall reside in the mansion house of Maryfort or Fortanebeg House, the right of cutting turf on the said bog, such right to extend to the cutting of turf to be used exclusively for consumption in the said mansion house of Maryfort and the house of Fortanebeg, and to include a reasonable right of access to the said bog for the purpose of exercising such right of turbary."

At the date of the said indenture John O'Callaghan was tenant for life of the house and lands of Maryfort under the provisions of a settlement, dated the 24th day of March, 1859, and a disentailing deed, dated the 26th day of March, 1895, and the reversion expectant on his life estate was vested in the plaintiff. John O'Callaghan was owner in fee-simple of the house and demesne lands of Fortanebeg.

John O'Callaghan up to the time of his death on the 7th of July, 1912, cut and carried away from the bog of Fortanebeg such turf as he required for the mansion house of Maryfort, in which he resided, but no turf appears to have been drawn in respect of Fortanebeg House, which has been unoccupied for the last thirty years.

In the year 1912 the Congested Districts Board took steps to acquire from the plaintiff the said lands of Fortanebeg, and having failed to come to an agreement with the plaintiff for the purchase, they sent to him a final offer in writing on the 3rd April, 1912, for the purchase of the estate and untenanted land for the sum of £41,000.

By sect. 60, sub-sect. 2, of the Irish Land Act, 1909, it is provided that the provisions of Part II of the Act with respect to the particulars to be inserted in the final offer sent by the Estates Commissioners shall apply in the case of a final offer sent by the

Congested Districts Board under the section, with the substitution of the Congested Districts Board for the Estates Commissioners.

It is provided by sect. 43, sub-sect. 2, of the Act that the final offer shall contain the following particulars:—(*a*) A description of the estate or untenanted lands to which the offer relates. (*b*) The amount of the price which the Estates Commissioners are willing to give for the estate or untenanted lands, subject (1) to any public rights affecting the estate or untenanted land; (2) to any maintenance charges under the Public Works Act; and (3) in the case of an estate, to any interest of the tenants or of persons having any claim upon those interests, and to any easements, rights, and appurtenances mentioned in sect. 34 of the Act of 1896.

The final offer complied with all the statutory requisites and did not refer to any reservation of turbary rights. The final offer was accepted on the 15th of May, 1912, and the offer and acceptance have the same effect as an agreement for the purchase of an estate or untenanted lands under the Act of 1903, save that the advance for the purpose of the purchase shall be made by means of money and not by means of stock. (Sect. 43, sub-sect. 2.) The vendor must, however, satisfy the Estates Commissioners that he may be dealt with as the owner of an estate or untenanted lands under sect. 17 of the Act of 1903, and the Estates Commissioners must certify that they are so satisfied, and in the present case the certificate was duly given on the 6th September, 1912. It then became the duty of the Estates Commissioners to prepare the vesting order, and it was accordingly prepared and submitted to the solicitor for the Congested Districts Board, and was duly approved of by him on the 8th November, 1912, and re-approved of, with slight alteration, on the 15th November, 1912. On the 21st November, 1912, the vesting order was made by the Land Commission, and it sets out that the lands of Fortanebeg were thereby vested in the defendants, "subject to the turbary rights reserved to the occupiers of houses in Maryfort and Fortane by a conveyance, dated the 23rd of February, 1908."

Under sect. 32, sub-s. 2, of the Land Law (Ireland) Act, 1896, the Land Commission shall immediately after the vesting order or fiat, prepare and transmit to the registering authority under the Local Registration of Title (Ireland) Act, 1891, the prescribed

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particulars as to the holding in order that the title of the purchaser to the ownership of the holding may be registered pursuant to that Act. Accordingly, on the 28th June, 1916, the Congested Districts Board were registered as full owners of the lands, subject to a reservation which is expressed in the folio in the following words:—"There are reserved out of these lands unto the occupiers of houses in Maryfort and Fortane the turbary rights reserved in a conveyance, dated the 23rd of February, 1908."

Under sect. 30, sub-s. 1, of the Local Registration of Title (Ireland) Act, 1891, on the registration of a person as full owner of land, an estate of fee-simple in the lands shall be vested in the person so registered; and, under sect. 30, sub-s. 3, the estate of the registered owner shall be subject as follows:—(*a*) to the burdens (if any) registered as affecting the land, and (*b*) except so far as the contrary is expressed in the register, to the burdens to which, though not registered, all registered land is declared by the Act to be subject, but shall be freed from all other rights, including rights of Her Majesty, her heirs and successors; and by sect. 34, sub-s. 1, the register shall be conclusive evidence of the title of the owner of the land as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in the Act shall interfere with the jurisdiction of any Court of competent jurisdiction based on the ground of actual fraud or mistake, and any such Court may, upon such ground, make an order directing the register to be rectified in such manner and on such terms as it thinks just.

Under sect. 47 of the Local Registration of Title (Ireland) Act, 1891, all registered lands shall be subject to certain burdens, including (inter alia) easements and profits à prendre, unless they are respectively created by express grant or reservation after the first registration of the land. The section, however, contains a proviso that, where the existence of such a burden is proved to the satisfaction of the registering authority, the authority may, with the consent of the applicant or registered owner or in pursuance of an order of the Court, enter notice thereof on the register.

The turbary rights have been entered on the folio in pursuance of the proviso in the section; and of course, in the present case, this could only have been done with the consent of the Congested Districts Board, as no order of the Court had been obtained. In my opinion the register in its present form is conclusive evidence that the Board acquired the fee-simple in the lands subject to the reservation of turbary contained in the deed of the 23rd January, 1908; and I shall now proceed to consider the nature of the rights contained in that deed.

John O'Callaghan lived at Maryfort, and he was also the owner of Fortanebeg House. When he parted with his tenanted lands and Fortanebeg Bog, he was naturally anxious to retain a right of turbary for these two houses. The object which he had in view could have been achieved by a proper mode of conveyancing, but the draftsman used a form of words which, in my opinion, had not the desired effect. The reservation is to the person or persons who now, or at any future time, shall reside in the mansion house of Maryfort or Fortanebeg House. There can be no doubt as to the person who then resided at Maryfort, because John O'Callaghan was himself living there at the time, and continued to live there until his death. There was, however, no person then living at Fortanebeg House, and no person has lived there for over thirty years. So far, however, as John O'Callaghan himself was concerned the reservation was good, but, in my opinion, it was clearly bad in so far as it purported to reserve rights to the persons who at any future time should reside in the mansion house of Maryfort or Fortanebeg House. It is clear from the cases which have been referred to in the course of the argument, and which it is unnecessary to again discuss, that there cannot in law be a grant in favour of an indefinite and fluctuating body of persons. As was stated by James L.J. in *The Commissioners of Sewers of the City of London* v. *Glasse* (1), "It is settled and clear law that you cannot have any right to a profit à prendre in alieno solo in a shifting body like the inhabitants of a town or the residents of a particular district." No release could ever be obtained of a right given to successive residents in a

(1) L. R. 7 Ch. App. 456, at p. 465.

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house, and the consequence would be that the land would continue subject to an unreasonable burden in perpetuity.

In this connexion the judgment of Lord Parker in *Kennedy* v. *Kennedy* (1) may be referred to with advantage, although the facts in that case were not strictly analogous to the present. A testator, by his will, appointed his son (the appellant) and his two granddaughters his executors and trustees, and devised a dwelling-house and its contents to the appellant, subject to each of his granddaughters being entitled to live therein as a home until she married. The will, after other devises and bequests, bequeathed the residue of his estate to the trustees to be used by them in maintaining the house and premises. It gave them power to make sales of any real estate, the proceeds to be devoted "to maintain my said residence in the manner in which it has been heretofore maintained"; and it further provided that if it should be necessary to sell the house, the residuary estate then remaining was to be divided equally among the said pecuniary legatees under the will. It was held by the Judicial Committee of the Privy Council that the trust constituted by the will offended against the perpetuity rule, and was void. Lord Parker said:—"The argument relied on before their Lordships was to the effect that, according to the true construction of the will, the trust was for the benefit only of the appellant and the two ladies who were entitled to use the dwelling-house as their home, and therefore could only be exercised during the lives of those persons, or the lives or life of the survivors or survivor of them. It is to be observed, however, that the trust is not to keep up a home for those three persons, but to keep up and maintain a dwelling-house as kept up and maintained before the testator's death. It is a trust which, if valid, would enure for the benefit of all persons for the time being interested in the dwelling-house, and is by the testator himself contemplated as coming to an end only if the dwelling-house be sold—an event which may not take place within the period allowed by the rule against perpetuities. The trustees, or a majority of them, are to determine as occasion arises the amount to be expended, and there can be

(1) [1914] A. C. 215.

no person entitled to determine the trust as long as there is any part of the trust fund remaining unexpended, provided the dwelling-house is still unsold. Under these circumstances their Lordships are of opinion that the trust offends against the perpetuity rule, and is void." (See *In re Clarke* (1); *In re Blew* (2); and *In re De Sommery* (3).)

In the present case it is quite clear that the reservation, if valid, would enure for the benefit of all persons for the time being resident in either of the two dwelling-houses mentioned, and it is not contemplated that it would come to an end at any time so long as the structure of the dwelling-houses remained. I am, therefore, of opinion that the turbary rights which are given by the deed of the 23rd of February, 1908, could not endure beyond the life of John O'Callaghan, and consequently did not operate in favour of the plaintiff. This, so far as the plaintiff is concerned, is sufficient to dispose of the case; but the greater portion of the argument, both here and in the Court below, has been devoted to the contention of the Congested Districts Board, that it was impossible for any reservation of turbary rights to be contained in the vesting order, although the Board had agreed to such a reservation, and had been a consenting party to the insertion of the turbary rights on the folio as a burden.

I do not think it is competent for the Congested Districts Board to raise such a contention in the present case so long as neither the vesting order nor the registration in pursuance thereof has been impeached in appropriate proceedings. It may be that, although the vesting order was submitted to them for approval and approved of by them, not once but twice, they are in a position to establish that such a reservation could not be inserted therein, and although Sir Henry Doran and the Inspectors had expressed to the plaintiff their desire and intention to reserve to him turbary rights, and the vesting order carries out what they desired and intended, no such rights could, in fact, legally be reserved, and that they are entitled to rely on such illegality in answer to a just claim.

(1) [1901] 2 Ch. 110. (2) [1906] 1 Ch. 624.
(3) [1912] 2 Ch. 622, at p. 630.

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I have listened with care and attention to the judgments of my colleagues, who have at great length discussed this question; but in the view which I take of this case I do not think it is open to me to pronounce any judgment upon it. The Congested Districts Board are registered as full owners subject to this express reservation. That express reservation contained in the vesting order and inserted in the folio with the consent of the Congested Districts Board can only be got rid of by means of certain proceedings which are pointed out in the statute. None of these proceedings has been taken by the Congested Districts Board; and, in the absence of substantive proceedings, I think it is not right for this Court to pronounce a judgment which would have the effect of destroying rights solemnly given by the Congested Districts Board and Irish Land Commission in many previous cases, to some of which our attention was specifically directed during the argument.

All I decide, therefore, in the present case is that, assuming the reservation could legally have been inserted in the vesting order, as in fact it was, the reservation could not operate beyond the life of John O'Callaghan, and consequently did not enure for the benefit of the plaintiff or any subsequent owner of the estate.

Solicitors for the appellant: *Maunsell, Darley, & Orpen.*
Solicitor for the respondents: *J. O'Connor.*

R. ST. J. C.

M'ELLISTRIM v. THE BALLYMACELLIGOTT CO-OPERATIVE AGRICULTURE AND DAIRY SOCIETY (LIMITED). No. 2.

(1916. No. 111.)

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1917
July 5, 6, 7, 31.

Appeal.
1918.
Feb. 19, 20.

Industrial and Provident Society — Rules — Dispute between Society and members — Rules alleged to be ultra vires — Restraint of trade — Prohibition of competition — Public policy — Arbitration — Industrial and Provident Societies Act, 1893 (56 & 57 *Vict. c.* 39).

The plaintiff in the year 1903 became a member of the defendant society, one of the rules of which prohibited the sale of milk to any creamery other than the defendant's creamery without the consent in writing of the committee, under the penalty of forfeiture of shares. In the year 1915, the defendant Society, under powers contained in the rules, altered the rule as to the sale of milk, the altered rule being in increased restraint of trade, and the language of the rule being identical with that of the rule the validity of which was established in the *Coolmoyne Society* v. *Bulfin* ([1917] 2 I. R. 107). The plaintiff objected to the alteration of the rule, and subsequently impeached its validity in this action. *Held*, by the Court of Appeal (reversing the decision of Barton J.), that the rule was binding on the plaintiff.

ACTION by the plaintiff claiming a declaration that certain rules adopted by the defendant society on the 18th day of January, 1916, and registered by the Registrar of Friendly Societies, were not binding on the plaintiff and the other members of the society. The plaintiff also claimed an injunction to restrain the society from acting on or putting in force the said rules.

The society was registered under the Industrial and Provident Societies Act, 1893, on the 6th March, 1903, and the plaintiff, who was the owner of a large farm and of a number of milch cattle at Ballydwyer, Ballymacelligott, became a member of the society under the rules adopted and registered in 1903. Rule 20 of these rules provided that "any member who shall supply milk to any creamery other than that owned by the society for the space of three years from the date of his admission to membership, without the consent in writing of the committee, shall forfeit his share, together with all money credited thereon."

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On the 29th of November, 1915, notices were sent out on behalf of the society to each member of a special general meeting to amend the rules of 1903 and to adopt certain new rules; and at the meeting held on 17th December, 1915, a resolution to adopt these new rules was carried by a show of hands, a poll being, as the plaintiff alleged, refused. These new rules were not registered by the Registrar of Friendly Societies. A further meeting of the society was summoned, and held on 18th January, 1916, when a resolution adopting the new rules was again carried, a poll having been taken, and these rules were subsequently registered. The plaintiff, as he alleged, attended both meetings of the society, and protested against the change of rules.

Rule 5 of the new rules limited the membership of the society to an area comprising between eighty and ninety townlands (including the townlands of Ballydwyer and Ballymacelligott), and provided that "no person carrying on any business similar to that in which the society is engaged shall be eligible to become or continue a member of the society."

Rule 6 (2) of the new rules provided that "after the society shall have started a creamery for its members, no individual member of the society, so long as he continues a member thereof, who shall have milk to sell, the produce of a cow or cows kept or grazed on lands within the area defined in Rule 5, shall, without the written consent of the committee first obtained, sell any such milk to any creamery other than a creamery of the society, or to any company, society, person, or persons who sells milk or manufactures butter for sale. Any member of the society committing a breach of this rule shall pay to the society, as and for liquidated damages and not by way of penalty, the sum of one shilling per cow per day for every cow's milk sold contrary thereto." The validity of a rule in identical language was established in *Coolmoyne Society* v. *Bulfin* (1).

Rule 16 of the new rules provided that "any member all of whose shares shall have been transferred or cancelled, shall thereupon cease to be a member of the society. A member shall not otherwise be entitled to withdraw from the society."

(1) [1917] 2 I. R. 107.

The plaintiff impeached the new rules of the defendant society above set out in respect of the several matters aforesaid as not binding on him and the other members of the society, as being (*a*) improperly adopted to the prejudice of the plaintiff and other members; (*b*) illegal as in unreasonable restraint of trade; (*c*) ultra vires the defendant society.

Evidence was given of the inconvenience resulting from the operation of the new rules.

Further rules provided that no member should withdraw from the society or assign his shares except by leave of the committee, and also that all disputes between members and the society were to be referred to the Irish Agricultural Organization Society. A motion by the defendants to stay the action under the latter rule was refused by the Court of Appeal (1).

Serjeant Sullivan K.C., *S. L. Brown K.C.*, and *Arthur Clery*, for plaintiff.

H. D. Conner K.C., *Carrigan K.C.*, and *D. B. Sullivan*, for defendants.

BARTON J.:— July 31

This action is brought by the plaintiff claiming a declaration that certain rules, adopted by the defendant society on the 18th January, 1916, and subsequently registered by the Registrar of Friendly Societies, are not binding on the plaintiff and upon the members who objected to the adoption of same.

The society was registered on the 6th March, 1903, under the Industrial and Provident Societies Act, 1893. Originally, and when plaintiff became a member, the 20th rule of the society provided that "any member who shall supply milk to any creamery other than that owned by the society for the space of three years from the date of his admission to membership without the consent of the committee in writing shall forfeit his shares with all money credited thereon." No objection was ever taken to that rule. Although in restraint of trade, it was agreed to by plaintiff; and his assent disposed of the question of reasonableness and of the requisite of consideration so far as he was concerned. It has not

(1) [1917] 1 I. R. 93.

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been suggested that from the point of view of public policy it exceeded what was reasonably necessary for the protection of the society.

The society seems to have prospered under this rule. But it was decided to introduce a more drastic one. The reasons were stated by the witnesses. The secretary, Mr. Byrne, said that it was introduced in view of the setting up of a new auxiliary creamery at Cortalea; and also to prevent members being tempted away by fancy prices offered by competitors. This danger was illustrated by the case of one member, Scanlan, who, having been annoyed at having his milk rejected on one occasion for sourness, had gone to Slattery, the rival proprietary creamery. Father Trant, P.P., said that the objects of the new rule were to keep members together, and to prevent farmers being tempted by temporary high prices, and he said that no rule could be too drastic for these purposes. Mr. Riddall, the organizer of the Irish I.A.O.S., said that the object of the rule was that defecting members should be prevented from supplying milk to a rival concern, instead of acting as loyal members of the society; and also that the committee, who were liable on a guarantee to the bank for £1,400, should be saved from having to liquidate their indebtedness out of their own pockets. Father Brennan, C.C., who gave his evidence with great intelligence and frankness, gave four reasons—1, that some farmers (e.g. Scanlan) were unreasonable in taking milk away because their milk had been rejected as sour; 2, to prevent members being tempted by special competition prices; 3, to assure a larger supply of milk; and 4, to safeguard the guarantors to the bank. These being the motives of the change, new rules were prepared, with the help and advice of the I.A.O.S., which are certainly very drastic and well calculated to carry out the above objects.

The membership of the society is by rule 5 limited to an area comprising between eighty and ninety townlands, and it is provided "that no person carrying on any business similar to that in which the society is engaged shall be eligible to become or continue a member of the society." Then comes the following rule, which is the one principally objected to. It is rule 6 (2):—"After the society shall have started a creamery for its members, no individual

member of the society, so long as he continues a member thereof, who shall have milk to sell, the produce of a cow or cows kept or grazed on lands within the area defined in rule 5, shall without the written consent of the committee first obtained, sell any such milk to any creamery other than a creamery of the society, or to any company, society, person or persons who sells milk or manufactures butter for sale. Any member of the society committing a breach of this rule shall pay to the society as and for liquidated damages, and not by way of penalty, the sum of one shilling per cow per day for every cow's milk sold contrary thereto."

This rule has been held to be reasonable from the point of view of public policy and to be binding on persons who have agreed to it in *The Athlacca Co-operative Creamery, Limited*, v. *Lynch* (1), and in the *Coolmoyne and Fethard Co-operative Creamery* v. *Bulfin* (2). The only question open to me is whether it is binding upon a member who has protested against it and has refused to agree to it. From that point of view it is pointed out that the rule is a drastic one. To the plaintiff, who has twenty cows, it means an obligation to pay liquidated damages at the rate of £365 a year; to the witness, Scanlan, who has forty-six cows, it means an obligation, if he continues to sell to another creamery, to pay liquidated damages at the rate of £800 a year. The plaintiff relies on several points in the evidence as distinguishing this case from the *Coolmoyne Case* (2).

The rules as to cessation of membership and transfer of shares are rules 16 and 21. Rule 16 is as follows:—"Any member, all of whose shares have been transferred or cancelled, shall thereupon cease to be a member of the society. A member shall not otherwise be entitled to withdraw from the society." Rule 21 enables members to transfer shares with the consent of the committee of management, and the committee shall not be bound to give any reason for refusing to sanction any transfer of shares.

That is only expressing the law on the subject. The committee must not exercise their power capriciously, but if they act bona fide with a view to the protection of the interests of the society the exercise of their discretion will not be interfered with (Lindley on Companies, p. 646). Father Brennan stated frankly that the

(1) 49 I. L. T. R. 233. (2) [1917] 2 I. R. 107.

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committee would not let out of the society men like the plaintiff or Scanlan in order to enable them to deal with a rival creamery. If so, it is safe to say that they could not escape without bringing an expensive and risky lawsuit. It would be difficult for a man with ten or twenty cows, and still more difficult for a man with forty or fifty cows, to find within the area of the society's operations, a transferee, or transferees, who would be available and equivalent, if this rule is a good and binding one. A committee acting bona fide, and as trustees for the society, might well consider themselves, and might well be considered, to be justified in refusing to let out any member without getting an equally desirable substitute or substitutes. To let out on other terms a man whose regular supply of milk is 100 gallons, and whose penalties for departure from the rule amount to £800 a year, would be almost a breach of trust.

The law on this subject is explained in Lindley on Companies. I quote from the 6th ed., vol. i, p. 647 :—"If their (the directors') consent to a transfer is necessary, and in giving or refusing their consent to a transfer they act bona fide with a view to the protection of the interests of the company, the exercise of their discretion will not be interfered with, and in such a case it is competent for them, if the company is in embarrassed circumstances, to resolve not to allow any transfers at all. If the directors refuse their consent to a transfer they are not bound to state the reasons of their refusal even when their power to refuse is limited to particular grounds of objection; if their conduct is questioned, the onus of proving that they have acted improperly is on the person complaining of their conduct."

Plaintiff and other large dairy farmers might find it difficult to discharge such an onus, if a committee bona fide desired to retain them for the benefit of their fellow-members.

Another point which was brought out in evidence at the trial is this. It is said that the rule does not prevent a member making his own butter, and selling to customers. That is so. But such a change in the methods of business would require a considerable expenditure in the way of labour, equipment, and skilled assistance. I have no doubt that the witness was sincere, and not in the least eccentric, who said that, if these rules are to bind

him against his will, he will have no other alternative but to sell his cows, and give up the dairy business.

There is another point which was pressed upon the Court. The witnesses in this case admitted that this society was prospering without this rule, and that in that sense it was not necessary for their protection, although very desirable for other things—their means of resisting competition, and for counter-securing the guaranteeing committee. Whether these points in any way distinguish the case from the *Coolmoyne Case* (1) will be for the Court of Appeal, and I do not think it proper or necessary for me to express any opinion of my own.

It has been pointed out in argument that the cases of contracts restraining servants or vendors from carrying on similar trades to those which were the subject of the contract of employment or sale are not of much help in a case between the members of a society which is formed for the purpose of working together, "each for all and all for each." More analogous are the cases of trading combinations against companies. In the leading case of *Mogul Steamship Company* v. *M'Gregor, Gow & Company* (2) all the noble lords who decided that case pointed out that contracts in restraint of trade, like the one which was in question in that case, might be legal and unobjectionable from the point of view of third parties, and yet be void and unenforceable as between the parties to the contract. Reference may be made to the speeches of Lord Halsbury (at p. 37), Lord Watson (at p. 42), and Lord Bramwell (at pp. 46, 47). Examples of such contracts being held unenforceable are *Hilton* v. *Eckersley* (3); *Collins* v. *Locke* (4); and *Mineral Water Bottle Exchange and Trade Protection Society* v. *Booth* (5).

Another analogous class of cases consists of the Trade Union cases, in which contracts as between members have, apart from the special sections of the Trade Union Acts, been held void as in restraint of trade. Of that class of case *Russell* v. *Amalgamated Society of Carpenters and Joiners* (6) is an example. At pp. 520 and 521 of that case Farwell L.J. cites the speech of Lord

(1) [1907] 2 I. R. 107.
(2) [1892] A. C. 25.
(3) 6 E. & B. 47.
(4) 4 A. C. 674.
(5) 36 Ch. Div. 465.
(6) [1910] 1 K. B. 506.

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Macnaghten in the *Nordenfelt Case* (1) to the effect that all interferences with individual liberty in trading is contrary to public policy, but may be justifiable, "if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."

These high authorities lay it down that an agreement in restraint of trade cannot be binding unless it is reasonable.

The judgments of the Court of Appeal in the *Coolmoyne Case* (2) proceed upon the basis that, where parties have deliberately entered into an agreement, they are the best judges of its reasonableness inter se, and of the adequacy of consideration. This appears from what was said by the Lord Chancellor at pp. 123, 124, and 127, and by Ronan L.J. in citing a passage of Viscount Haldane's speech in the *North Western Salt Company* v. *Electrolytic Alkali Company* (3), to the effect that in cases of this kind the law regards the parties as the best judges of what is reasonable among themselves. This principle, upon which the Lord Chancellor and Ronan L.J. laid stress, has a very remote relation to the position of a man like the plaintiff, who not only never assented to this rule, nor admitted its reasonableness, but regards it as injurious if not ruinous to himself, and has protested against it in every possible way.

The defendants' case rests almost entirely upon the society's power of altering its rules, strengthened by sect. 22 of the Industrial and Provident Societies Act, 1893, which gives to the society's rules the force and effect of a binding covenant under seal. The section is analogous to sect. 13, sub-s. 1, of the Companies Consolidation Act, 1908, except that the latter is more express in its reference to alterations.

The cases have gone far in recognizing the binding effect on the members of companies or societies, of alterations of rules, even so far as to render members liable to be deprived of vested rights and benefits by a change of rule. But the power of binding

(1) [1894] A. C. 535, at p. 565. (2) [1907] 2 I. R. 107.
(3) [1914] A. C. 461, at p. 471.

existing members by an altered rule is admittedly subject to limitations: see Lindley M.R. in *Allen* v. *Gold Reefs of West Africa, Ltd.* (1), and per Chitty L.J. in *Strohmenger* v. *Finsbury Permanent Investment Building Society* (2). They certainly must not exceed the powers of the society, and no society has power to impose a rule in restraint of trade which is not reasonable as between the parties, both from the point of view of public policy, and of adequacy of consideration. This rule has been held reasonable from the point of view of public policy, but it has never been submitted to the tribunal which the law recognizes as the test of reasonableness inter se, and of adequacy of consideration, namely—the free judgment of the individual member.

The defendants say that when the plaintiff entered the society with its power of alteration of rules, he agreed to abide by not merely the existing rule in restraint of trade to which he expressly consented, but also any new rule in restraint of trade which might be passed by two-thirds of the members for the time being, and which might be held to be reasonable from the point of view of public policy. In my opinion it is not possible to attribute to him any such implied agreement. Upon the question of reasonableness inter se, and adequacy of consideration, the law, as a general rule, is quite unconcerned, because it leaves the matter to the judgment of the individual, but it could not be consistent with that attitude of the law to attribute to an individual who joins a society an implied contract to surrender for the rest of his life his judgment upon those subjects to the voice of a two-thirds majority. One of the limits to the power of binding members by altered rules, and one of the qualifications upon the implied contract, which is attributed to every member, to be bound by altered rules, is, I think, that the society cannot bind him, and he cannot be supposed to have agreed to be bound, by a rule in restraint of trade, unless he is given a free opportunity of forming his judgment as to its reasonableness from his point of view, and as to the adequacy of the consideration as between him and the society.

(1) [1900] 1 Ch. 656, at p. 671. (2) [1897] 2 Ch. 469, at p. 480.

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I agree that no co-operative organization could be effective without rules, and without a power of changing rules. The voluntary association of individuals for mutual aid could not be maintained effectively without a system involving the overruling of minorities by majorities. But I think it is alike in accordance with the principle of voluntary co-operation, and of the attitude of the law to that admirable branch of human effort, that the power of overruling minorities should be limited by the agreement of the members expressed and implied, and shall always be subject to an effective ultimate right of secession.

As regards the latter point, I need add nothing to what I have already said. As regards the former, I cannot attribute to any individual member an implied agreement to surrender to the prescribed majority that freedom of judgment upon the reasonableness and the adequacy of the consideration of a covenant in restraint of trade, which, in the eye of the law, depends on the reasons of his entering into such a covenant, in the free exercise of his personal judgment, and I do not think that such a sweeping surrender of personal freedom can be necessary for the protection of this society.

I need only add that my decision is entirely consistent with the decisions in the *Athlacca Case* (1) and the *Coolmoyne Case* (2), and rests upon the ratio decidendi of these cases. In these cases the rule was held valid and binding upon those who had agreed to it, but one of the reasons for holding so was because they had agreed to it. If it appears that the plaintiff has never expressly or impliedly agreed to it, it cannot, in my opinion, be imposed upon him in invitum. The agreement, which I hold unreasonable and void, is not the rule, but the alleged agreement which it is sought to attribute to every member of this society, that he would be bound by any and every new rule in restraint of trade, without having an opportunity of exercising his free judgment upon its reasonableness from his point of view, and upon the adequacy of the consideration which it offered to him.

R. W. I.

(1) 49 I. L. T. R. 233. (2) [1917] 2 I. R. 107.

The defendant appealed to the Court of Appeal.

Appeal. 1918.

Conner K.C. and *Carrigan K.C.* (*D. B. Sullivan* with them), for the appellants:—

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Feb. 19, 20.

The effect of the decision appealed against is that the rule which this Court held valid in the *Coolmoyne Case* (1) is held invalid and not binding on the plaintiff in this action. We contend, however, that, as the plaintiff joined a society which had admittedly power to alter its rules, and as the alteration was lawfully made, and a new rule, the validity of which has been established, introduced, the plaintiff, although he objected to the new rule, must be bound by it: *Butler* v. *Springmount Dairy Society* (2). The power of a society such as the defendant society to alter its rules under sect. 10 of the Industrial and Provident Societies Act, 1893, and the provisions of its own rules, is analogous to that of companies to alter the regulations contained in their articles, which is limited only "by the provisions contained in the statute, and the conditions contained in the company's memorandum of association." See judgment of Lindley M.R. in *Allen* v. *Gold Reefs of West Africa, Ltd.* (3). The power must, no doubt, be exercised bona fide, and for the benefit of the society as a whole; but that is the case here. The object of the alteration was to compel all the members, including the plaintiff, to adhere to the rules concerning the sale of milk to the society alone. *Pepe* v. *City and Suburban Permanent Building Society* (4) shows how far the Courts have gone in binding members by alteration of rules. That the plaintiff did not consent to the alteration is immaterial. The only question is, Was the alteration lawfully made?

They also referred to *Collins* v. *Locke* (5); *Evans & Co.* v. *Heathcote* (6); *Strohmenger* v. *Finsbury Permanent Investment Building Society* (7); *Laing* v. *Reed* (8); *Russell* v. *Amalgamated Society of Carpenters and Joiners* (9).

(1) [1917] 2 I. R. 107.
(2) [1906] 2 I. R. 103.
(3) [1900] 1 Ch. 656, at p. 671.
(4) [1893] 2 Ch. 311.
(5) 4 A. C. 674.
(6) [1917] 2 K. B. 336.
(7) [1897] 2 Ch. 469.
(8) L. R. 5 Ch. App. 4.
(9) [1910] 1 K. B. 506.

Appeal. 1918.

M'ELLISTRIM v. BALLYMACELLIGOTT CO-OPERATIVE SOCIETY.

Serjeant Sullivan K.C. and *S. L. Brown K.C.* (*Clery* with them), for the respondent:—

We contend that this case is not ruled by the decision in the *Coolmoyne Case* (1). Here the plaintiff joined the society prior to the alteration of the rules. He never consented to the new rule, or received any new consideration in respect of it, and, as it involves an unreasonable restraint of trade, it cannot be held binding on the plaintiff. No exercise of a power of a society to alter its rules will bind a member when the new rule is prima facie illegal. A rule in restraint of trade is prima facie illegal. The validity of such a rule depends upon its reasonableness, and two conditions must be fulfilled. The rule must be reasonable in the interests of the parties, and it must be reasonable in the interests of the public: *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Company* (2); *Herbert Morris, Ltd.* v. *Saxelby* (3); *Evans & Co.* v. *Heathcote* (4). The present rule fulfils neither condition. In the case of a rule in restraint of trade existing at the date of a member joining the society the fact that it was so existing is practically conclusive between the member and the society as to its reasonableness; but, in the case of a new rule in increased restraint of trade, the fact that it was passed under a power of altering rules (which would bind the member in the case of a lawful rule) is no evidence of the reasonableness of the altered rule as between the member and the society.

They referred to *Hanley's Case* (5).

Conner, in reply.

Cur. adv. vult.

SIR IGNATIUS J. O'BRIEN C.:—

During the hearing of this appeal it was mentioned to us that it was intended to bring the case ultimately before the highest appellate tribunal in this country, and this is especially right, because undoubtedly the result of our decision is that the plaintiff becomes bound by very stringent regulations, and the question of the binding effect of these regulations is one of immense importance to the agricultural community in this country, having regard

(1) [1917] 2 I. R. 107.
(2) [1894] A. C. 535.
(3) [1916] 1 A. C. 688, 706, 707.
(4) [1917] 2 K. B. 336.
(5) [1912] 2 I. R. 586.

to the development of the business carried on by these co-operative societies. The action came before us originally on an application to stay all proceedings on the ground that there was no jurisdiction in the King's Courts to entertain the claim, the proper tribunal being, it was suggested, the one indicated in the rules of the society. This Court, however, decided that there was jurisdiction to determine the case. I mention this for the purpose of emphasizing the fact that the plaintiff has not abandoned this point, although it was not argued on the hearing of the present final appeal. It was of course recognized that this Court was bound by its former decision on this question of jurisdiction, and also by its former decision as to the validity of the identical rule in question in the *Coolmoyne Case* (1), and accordingly neither of these questions was re-opened before us; but it was also clearly recognized by counsel on both sides that neither point was abandoned, and that both these questions will be open for argument in the House of Lords.

The question argued before us is purely a subsidiary one, namely, whether the rule, which must, according to our previous decision in the *Coolmoyne Case* (1), be assumed to be a valid rule, and not void as being in undue restraint of trade, is, in the circumstances of this case, not binding upon the plaintiff. I may note at the outset, without entering upon details, that the powers of making alterations in the rules conferred by statute upon societies such as the defendant society are substantially the same as the powers which a limited liability company has under statute to alter its articles of association. The plaintiff had joined the defendant society at a time when the new rule (6) was not in force, and his position was controlled by rule 20 of the old rules, which provided that "Any member who shall supply milk to any creamery, other than that owned by the society, for the space of three years from the date of his admission to membership, without the consent in writing of the committee, shall forfeit his share, together with all money credited thereon." This, it was contended, in effect enabled the plaintiff to leave the society on forfeiting his shares, and all money credited thereon, when he could sell his milk in the open market. Rule 6 (2) of the new rules was then passed, which undoubtedly effected a great change in the plaintiff's

(1) [1917] 2 I. R. 107.

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position, and I accept the evidence given at the trial that this change was introduced for the purpose of more effectually protecting the interests of the society and its members, including the plaintiff himself, by ensuring that each member would remain faithful to his undertaking with the society. By the new rule the society was bound to take the milk from its members, and the members were prohibited from selling milk to any creamery other than a creamery of the society, or to "any company, society, person or persons who sell milk or manufacture butter for sale"; and the rule provided that "any member of the society committing a breach of this rule shall pay to the society, as and for liquidated damages, and not by way of penalty, the sum of one shilling per cow per day for every cow's milk sold contrary thereto." As I have said, this Court has already decided that this rule is not invalid as being in undue restraint of trade; it is doubtless a stringent rule, and the penalty inflicted is a severe one, and it is suggested that the majority of the members have no right to alter the rules in such a way as to impose on the plaintiff this heavy obligation which did not exist at the date when he joined the society. It is assumed for the purposes of the present argument, as it must be having regard to our former decision in the *Coolmoyne Case* (1), that the rule is lawful; but it is said that the rule is in fact in restraint of trade, that every rule which is in fact in restraint of trade is prima facie unlawful, and that this rule, though otherwise lawful, must be considered unlawful as against the plaintiff, it being one forced on a dissenting member by the majority. I hope I have stated the proposition accurately, because I have myself had some difficulty in appreciating the distinction which is sought to be made. The view which I take as to this contention is as follows:—The plaintiff joined an association which had power to alter its rules; it did alter its rules, and adopted rule 6, which we have held to be a lawful rule. The plaintiff must be bound then by this lawful alteration, he having joined an association which had power to make the alteration. No doubt cases might arise where the majority might place the minority of the members at a serious disadvantage by adopting an amendment of the rules for a collateral or dishonest purpose, and I do not say

(1) [1917] 2 I. R. 107.

that the minority would be bound in such a case. That, however, is not the present case; and it appears to me that our previous decision in the *Coolmoyne Case* (1) definitely rules the present one.

I only wish to refer to two cases dealing with this subject of the alteration of rules. The first of these is *Pope* v. *City and Suburban Permanent Building Society* (2), where the plaintiff, who was the holder of fully paid-up shares in a building society, gave notice of withdrawal of his shares, but before he was repaid an alteration of the rules was made which materially affected his position, and which was held binding upon him notwithstanding his having served notice of withdrawal. At p. 314, Chitty J. said: "Mr. Daniel says that this case only establishes that altered rules are binding when the alteration is of a comparatively slight nature, such as was the rule in question in that case regarding arbitration; but I can find no such proposition in the judgment, nor can I see how, on principle, I can make the distinction contended for. The Court would have in each case to examine the subject to which the alteration applied, and to say whether it was material or trifling, and so binding or not binding. That would be to embark on a difficult course; and where would the Court draw the line?" That undoubtedly was a very strong decision, as the plaintiff had actually served notice of withdrawal; it was approved, however, by Lindley M.R. in *Allen* v. *Gold Reefs of West Africa, Ltd.* (3), which is the second case to which I wish to refer. At p. 672 of the report in this case the learned Master of the Rolls said: "But then comes the question whether this" (the alteration of articles by special resolution) "can be done so as to impose a lien or restriction in respect of a debt contracted before and existing at the time when the articles are altered. Again, speaking generally, I am of opinion that the articles can be so altered, and that, if they are altered bona fide for the benefit of the company they will be valid and binding as altered on the existing holders of paid-up shares, whether such holders are indebted or not indebted to the company when the alteration is made." When I find the law so settled in the case of companies

(1) [1917] 2 I. R. 107. (2) [1893] 2 Ch. 311.
(3) [1900] 1 Ch. 656.

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under the Companies Act I cannot doubt what our decision in the present case should be.

It has been suggested that we should draw the inference from the evidence that the directors of this society have made up their minds not to release the plaintiff from his obligations, but to withhold their consent to his transferring his shares, so as to compel him to continue to supply milk to them, or in default to pay these heavy penalties. I should be slow to draw any such inference, and I do not think that the evidence requires me to do so. The appeal must be allowed.

RONAN L.J. :—

I am of the same opinion. There are really three questions in this case, though only one of them has been argued before us on this occasion.

First, had the High Court jurisdiction to try this action, or is its jurisdiction ousted by sect. 49 of the Act of 1893? The majority of this Court in refusing a motion to stay the action did so on the ground that the jurisdiction was not ousted (1). I was of a contrary opinion for the reasons there stated, but in deference to the views of my colleagues I did not dissent from the order that the action should not be stayed at that stage. I arrived at that opinion on the grounds—1, that the action was only one to have a particular rule declared void by a member of the society; 2, that on the true construction of sect. 49 of the Industrial and Provident Societies Act, 1893, this was a dispute between a member, qua member, and the society; 3, that the cases of *Stone* v. *Liverpool Marine Society* (2), and *Cox* v. *Hutchinson* (3), were clear authorities which we should follow, and that the course of legislation subsequent to the former case made it on settled principles a binding authority. I also held that these cases were not overruled by *Heard* v. *Pickthorne* (4). I wish to add here that in the case of *Walker* v. *General Mutual Building Society* (5), Bowen L.J. applied this latter principle to the present code. 4, I thought that the earlier authorities and the history of the

(1) [1917] 1 I. R. 93.
(2) 63 L. J. (Q. B.) 471.
(3) [1910] 1 Ch. 513.
(4) [1913] 3 K. B. D. 299.
(5) 36 Ch. D. 785.

legislation as stated in the long passage I read from the judgment of Sterling J. in *Municipal Building Society* v. *Richards* (1), confirmed this view.

This question of jurisdiction was not raised in the *Coolmoyne Case* (2), though that was an action depending on the validity of the rule impeached in the present action. This was in consequence of sect. 23 of the Act, which gave the County Court a jurisdiction distinct from that conferred by sect. 49. I am still of opinion that the question in this action as presented to us on the former appeal and on the present appeal is a dispute within the meaning of sect. 49, and that therefore the High Court had no jurisdiction to entertain the action. I refer to my former judgment for my reasons. I shall only add that it seems a strange intention to impute to the Legislature that the County Court should have jurisdiction to determine the validity of a rule where the member is the defendant and the society are the plaintiffs, but not where the society are the defendants and the member is the plaintiff.

The second question in this case really is, "Was the *Coolmoyne Case* (2) rightly decided?" That question must be decided by a higher tribunal. We are bound by our decision. It was an action to recover money under the identical rule, and the only question was as to the validity of the rule. It was not, nor is the present case, similar to the curious case of *William Robinson and Company* v. *Heuer* (3), where the question was whether the Court in its discretion would apply the equitable remedy of injunction or specific performance to a contract of service containing provisions in restraint of trade during the continuance of the relation of master and servant. I mention this case, because in my judgment in the *Coolmoyne Case* (2) I asked if there was any case except *Hanley's Case* (4) where a stipulation in a contract of service or partnership or articles of association operating only so long as the relation subsisted, or the party continued a member, was held void as being an unreasonable restraint of trade. I was told that counsel had found no such case. I repeated this question on the

(1) 39 Ch. D. 372.
(2) [1917] 2 I. R. 107.
(3) [1898] 2 Ch. 451.
(4) [1912] 2 I. R. 586.

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hearing of the present appeal, and got the same answer. In *Robinson's Case* (1), the Court took the distinction taken in the judgments in the *Coolmoyne Case* (2). See the judgment of Lindley M.R., at pp. 455-6, and that of Chitty, L.J., at p. 458 They held that the contract was valid during the engagement They limited the injunction for special reasons.

I am of opinion that the *Coolmoyne Case* (2) was rightly decided for the reasons stated in the judgments in the *Athlacca Case* (3), as adopted in the *Coolmoyne Case* (2), and in the judgments in the *Coolmoyne Case* (2) in both Courts. I may mention that the difficulty I felt in that case in consequence of the absence of a rule as to withdrawal does not arise in the present case, as rule 16 provides for this. The provision in the Act requiring such a rule clearly shows that the Legislature did not consider it improper to have a rule prohibiting withdrawal. I was disposed to regard this provision rather in the light of a danger signal to warn people that if they joined the society they might not be able to leave it if they wished to do so.

The third question in the case, and the only one really argued before us, is whether the present case can be distinguished from the *Coolmoyne Case* (2)—(*a*) by reason of the evidence given in the case; (*b*) on the grounds stated in the judgment of Barton J., and argued before us.

The only ground on which it was alleged that the article was void was that it was in restraint of trade. As to the evidence, I think the greater part of it may be wholly disregarded. In *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Company, Ltd.* (4), Lord Parker says (p. 797): "Further, it must be remembered that the question whether a restraint of trade is reasonable, either in the interest of the parties or in the interest of the public, is a question for the Court, to be determined after construing the contract, and considering the circumstances existing when it was made. It is really a question of public policy, and not a question of fact, upon which evidence of the actual or probable consequences, if the contract be carried into effect, is admissible." It appears to me that much of the

(1) [1898] 2 Ch. 451.
(2) [1917] 2 I. R. 107.
(3) 49 I. L. T. R. 233.
(4) [1913] A. C. 781.

evidence in the present case comes clearly within the category of evidence which Lord Parker there held inadmissible. It seems to me absurd to contend, as was attempted in the argument, that this statement only applies where the question is whether the restraint was reasonable in the interest of the public, and not when it is whether it was reasonable in the interest of the parties. It refers in express terms to both cases. What puts the matter beyond doubt is Lord Parker's previous statement (at p. 795): "Their Lordships are not aware of any case in which a restraint, though reasonable in the interests of the parties, has been held unenforceable because it involved some injury to the public." So that in no case has a contract been held void as in restraint of trade, except where it was unreasonable in the interests of the parties. The question in these contract cases always assumes that the parties have made the contract, and that it is unenforceable only because it is in restraint of trade; this must mean, for the reason above stated, unreasonable in the interests of the parties, though they have fully and freely consented to the stipulation containing the restraint.

I have referred to this very obvious proposition because it seems to have been strangely overlooked in the judgment of Barton J. in this case. In the *Adelaide Steamship Company Case* (1), Lord Parker says, at p. 795: "Though, speaking generally, it is the interest of every individual member of the community that he should be free to earn his livelihood in any lawful manner, and the interest of the community that every individual should have this freedom, yet, under certain circumstances, it may be to the interest of the individual to contract in restraint of this freedom, and the community if interested to maintain freedom of trade is equally interested in maintaining freedom of contract within reasonable limits," . . . and in the same case, at p. 797: "The right of the individual to carry on his trade or business in the manner he considers best in his own interests involves the right of combining with others in a common course of action, provided . . . it is not with a view to injure others." This was the judgment of the Privy Council, consisting of Lords Haldane, Shaw, Moulton, and Parker. In *Herbert Morris,*

(1) [1913] A. C. 781.

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Ltd. v. *Saxelby* (1), Lord Parker said that he adhered to everything he had said in *Attorney-General of the Commonwealth of Australia* v. *Adelaide Shipping Company* (2); and he continued: "It is not that such restraints [of trade] must of themselves necessarily operate to the public injury, but that it is against the policy of the common law to enforce them except in cases where there are special circumstances to justify them. The onus of proving such special circumstances must, of course, rest on the party alleging them. When once they are proved, it is a question of law for the decision of the judge whether they do or do not justify the restraint. There is no question of onus one way or another. It will be observed that in Lord Macnaghten's opinion two conditions must be fulfilled if the restraint is to be held valid. First, it must be reasonable in the interests of the contracting parties, and, secondly, it must be reasonable in the interests of the public. In the case of each condition he lays down a test of reasonableness. To be reasonable in the interests of the parties the restraint must afford adequate protection to the party in whose favour it is imposed; to be reasonable in the interests of the public it must be in no way injurious to the public . . . As long as the restraint to which he subjects himself is no wider than is required for the adequate protection of the person in whose favour it is created, it is in his interest to be able to bind himself for the sake of the indirect advantages he may obtain by so doing." And then follows a passage which is of importance, having regard to one of the reasons given by Barton J. for his decision in the present case, namely, that the respondent had no opportunity of considering the adequacy of the consideration. Lord Parker says, at p. 707: "It was at one time thought that, in order to ascertain whether a restraint were reasonable in the interests of the covenantor, the Court ought to weigh the advantages accruing to the covenantor under the contract against the disadvantages imposed upon him by the restraint, but any such process has long since been rejected as impracticable."

In dealing with the rules of these societies the Court has proceeded on the view that a rule would be unlawful if it imposed a restraint of trade which would have been unenforceable if con-

(1) [1916] 1 A. C. 688, at p. 706. (2) [1913] A. C. 781.

tained in a contract of a similar or analogous character between the parties. The Industrial and Provident Societies Act, 1893, sect. 22, provides:—"The rules of a registered society shall bind the society and all members thereof and all persons claiming through them respectively to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were contained in such rules a covenant on the part of such member, his heirs, executors, administrators, and assigns, to conform thereto, subject to the provisions of this Act."

This section is almost identical with sects. 11 and 16 of the Companies Act of 1862, and sect. 14, sub-s. 1, of the Companies Act of 1908, as to the effect of the memorandum and articles of association of a company. The decisions on these latter sections are collected and considered in the judgment of Astbury J. in *Hickman* v. *Kent or Romney Marsh Sheep-breeders' Association* (1). The result is that the memorandum and articles constitute a contract between the company and its members.

In *Auld* v. *Glasgow Working Men's Building Society* (2) Lord Macnaghten says:—"In societies of this sort the rules form the contract between the members and the society, and that contract can only be altered in the mode prescribed by the Act of Parliament." They are not a contract, but they have by force of the statute the operation of a contract.

Sect. 79 of the Act provides that in the Act "rules" shall mean "the registered rules for the time being, and shall include any registered amendment of rules." The statutory contract under sect. 22 is, therefore, contained in the registered rules for the time being. Sect. 10, sub-s. 1, of the Act and Schedule II (3) direct that the rules shall contain provisions in respect of, inter alia, the mode of making, altering, or rescinding rules. The original rules of the defendant society contained these provisions in Chapter X. Special Rule XX of the original rules (the rule altered), which the Lord Chancellor has already read, was not a fundamental rule. Accordingly, it could be altered and new rules made by a majority of two-thirds of members at a general meeting. The present rules were duly made and passed by such a majority at a general meeting,

(1) [1915] 1 Ch. 881. (2) 12 A. C. 197.

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and duly registered. They are now the rules within sect. 22, and constitute the statutory contract.

The impeached rule is one of these rules. It is admitted to be a valid rule under the decision in the *Coolmoyne Case* (1), and not bad as being in restraint of trade. There is no suggestion that it is invalid on any other ground. The plaintiff does not assert that it is invalid. It was pointed out to us that the judgment is carefully confined to declaring that the rule is not binding on the plaintiff. I have read and re-read the judgment of Barton J. The only ground I can find for his decision is that the plaintiff did not assent to the rule, i.e., that he was one of the minority at the meeting which passed the rule by the requisite two-thirds majority. If the rule was invalid as being in restraint of trade or on any other ground, I could understand the decision; but I confess I fail to see how it can be binding on the society and on the majority at the meeting as a lawful rule and not binding on the minority.

I myself decided the *Athlacca Case* (2) on Circuit. I was party to the decision of the *Coolmoyne Case* (1), but it never occurred to me that the assent or dissent of a member was the test, or a test, of whether a rule was lawful as being in restraint of trade. I find a difficulty in seeing how a company or society can be carried on if one set of rules or articles is binding on a majority of the members and another set of rules or articles on the minority. Such a state of things seems to me utterly inconsistent with the whole scope of the Companies Acts and the Societies Acts.

Barton J. seems to me to have assumed that the rules derive their force from some contract, and he speaks of the adequacy of the consideration. He says: "This rule has been held to be reasonable from the point of view of public policy, and to be binding on persons who have agreed to it: *Athlacca Case* (2) and *Coolmoyne Case* (1)." [There was no suggestion of any such limitation in either case.] "The only question open to me is whether it is binding upon a member who has protested against it and has refused to agree to it." His ratio decidendi seems to me contained in these words: "No society has power to impose a rule in restraint of trade which is not reasonable between the parties, both from the

(1) [1917] 2 I. R. 107. (2) 49 I. L. T. R. 233.

point of view of public policy and that it is not for valuable consideration. This rule has been held reasonable from the point of view of public policy, but it has never been submitted to the tribunal which the law recognizes as the test of reasonableness inter se, and of adequacy of consideration, namely, 'the free judgment of the individual member.'" As to the last paragraph of the judgment, I would point out that the rule is binding on the plaintiff as being a lawful rule, lawfully made under statutory authority, not by reason of any alleged agreement entered into by him that he would be bound by every new rule. The suggestion of such an agreement is not put forward as the foundation of liability. It is put forward as the explanation of the reasonable operation of the statute. The statute and the original rules the plaintiff had before him when he became a member. He had full notice that he would be bound by any lawful rule passed by the requisite majority, whether he liked it or not. There is no hardship in the operation of the statute.

The principle of freedom of contract applicable to such a case as this is the freedom to determine whether a man will or will not choose to become a member of a society or company which gives power to a certain majority of the members to alter the rights and liabilities of all the members, including himself, in relation to the society or company. The confusion between real contract and statutory liability is increased by the constant use of the term "adequacy of consideration." There is no question of consideration for the passing of a new rule. Even in the case of a real actual contract the Court, as laid down by Lord Parker in the words I have already quoted, "no longer considers the adequacy of the consideration in any particular case."

The Lord Chancellor has already referred to the very strong decisions in the English Courts dealing with analogous powers of altering rules, and it is unnecessary for me to repeat what he has said. The only limitations that I can find on the power of making new rules are that the alteration must be a lawful alteration, and that the company or society must have acted bona fide. I am satisfied that the society has acted bona fide and in the interests of its members as a body in this case, and, in my

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judgment, the fact that the plaintiff has refused to assent to the alteration of the rules is not material.

For these reasons, and for the reasons contained in the judgment of the Lord Chancellor, I am of opinion that the appeal must be allowed.

MOLONY L.J.:—

The Ballymacelligott Co-operative Agricultural and Dairy Society, Limited, was registered under the Industrial and Provident Societies Act, 1893, on the 6th March, 1903, and the plaintiff shortly afterwards became a member of the society, and subscribed £8 15*s.* for ten shares.

The rules of the society are divided into two parts—general and special. Rule 120 of the general rules provides that any rule of the society not declared to be fundamental may be rescinded or altered or any new rule be made by a majority of two-thirds of the members present at any special general meeting. Special rule 20, which was not declared to be fundamental, provides that any member who shall supply milk to any creamery other than that owned by the society for the space of three years from the date of his admission to membership, without the consent in writing of the committee, shall forfeit his shares, together with all money credited thereon. In the year 1916 the defendant society considered it desirable to alter their rules; and they accordingly adopted the statutory procedure for making new rules, and passed rule 6 (2), which has been under review in the present action, in substitution for special rule 20 of the former rules. The plaintiff impeaches rule 6 (2) on the grounds that it was (*a*) illegal as in unreasonable restraint of trade; (*b*) ultra vires the defendant society as being against public policy; and (*c*) not binding on the plaintiff in consequence of having been adopted in breach of the plaintiff's original contract of membership with the society and without his consent.

This Court, in *The Coolmoyne and Fethard Co-operative Creamery, Ltd.*, v. *Bulfin* (1), has decided that a rule in precisely similar language to the present did not amount to an illegal

(1) [1917] 2 I. R. 107.

restraint of trade, and did not create such a monopoly as to offend against public policy. Mr. Justice Barton was, of course, bound by the decision in the *Coolmoyne Case* (1); but he held that a member could not be supposed to have agreed to be bound by a rule in restraint of trade unless he was given a free opportunity of forming his judgment as to its reasonableness from his point of view, and as to the adequacy of the consideration as between him and the society. In my opinion, there is no distinction between the *Coolmoyne Case* (1) and the present; and this will clearly appear from a very short consideration of the principles under which alterations are made in statutory rules. Under sect. 22 of the Industrial and Provident Societies Act, 1893, the rules of a registered society shall bind the society and all the members thereof, and all persons claiming through them respectively to the same extent as if each member had subscribed his name and affixed his seal thereto; and there were contained in such rules a covenant on the part of such member, his heirs, executors, administrators, and assigns to conform thereto, subject to the provisions of the said Act. When, therefore, a person joins a society formed under rules which provide for the making of new rules, and new rules are made in pursuance of the statutory provisions, the member is just as much bound by the new rules as he was by the old. As Wright J. observed in *Smith* v. *Galloway* (2):—"Where the only contract between the society and the member is the original contract under which he became a member, and that, as is the case here, provides for alteration of the rules, he is bound by any subsequent alteration that may be made within the power of alteration, whatever the extent of that alteration may be." The statute does not provide any limits within which rules may be altered, and it is obvious that the power to alter rules is subject to some limitations; but it may be said that any alterations may be made, provided they are made in good faith, are not unlawful, and are not framed so as to give an unfair advantage to a majority of the members: *Strohmenger* v. *The Finsbury Permanent Investment Building Society* (3); *Allen* v. *The Gold Reefs of West Africa* (4).

(1) [1917] 2 I. R. 107.
(2) [1898] 1 Q. B. 71.
(3) [1897] 2 Ch. 469-480.
(4) [1900] 1 Ch. 656.

Appeal.
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ELLIGOTT CO-
OPERATIVE
SOCIETY.

Molony L.J.

In the present case I am quite satisfied that it was competent for the society in the prescribed manner to alter the rules as they have done, and that the plaintiff is bound by the alterations, which were duly made. When the alterations are approved of by the prescribed majority and passed in the prescribed manner, it is, I think, impossible for the plaintiff to successfully contend that new rules, although in themselves perfectly lawful, are not binding upon him unless he in express terms assents to them. I am, therefore, of opinion that the appeal ought to be allowed, and this action dismissed, with costs in the Court below and of this appeal.

Solicitor for the plaintiff: *E. B. Slattery.*
Solicitor for the defendant: *J. D. O'Connell.*

R. ST. J. C.

Ross J.
1918.

May 7, 15.

SMYTH, OWNER; TOMS, PETITIONER.

Marshalling—Successive charges on different estates—Deficiency of funds—Rights against third parties—Apportionment.

The owner of two estates, A and B, and his predecessors in title created incumbrances affecting them:—the first on A and B; the second on A; and the third on A and B. The third incumbrancer had notice of the prior charges.

A was sold, but the proceeds were not sufficient to pay more than the first incumbrance and part of the second. B having been subsequently sold,

Held, that the owners of the second incumbrance were not entitled to marshall, but only to have an apportionment of the first incumbrance between A and B, and to have a recoupment on this basis.

Archer's Estate, [1914] 1 I. R. 285, not followed.

MOTION ON NOTICE.

Wilhelmina Smyth and Jane Smyth, daughters of John Smyth, deceased, the father of the owner herein, who were annuitants under his will, applied for an order that the balance of the redemption prices of their annuities and the arrears of interest thereon should be paid to them out of the money in Court to the

credit of the matter, and that the funds should be marshalled so as to meet said balance and interest.

John Smyth, who died in 1872, was possessed of three denominations of lands or interests in lands which may be described as follows:—(*a*) The five townlands; (*b*) the lands of Rathcoursey; (*c*) certain rents.

Affecting the above estates were the following incumbrances:—

1. An old charge for £2000, created in 1788, affecting (*a*), (*b*), and (*c*).

2. An old charge for £1000, created in 1825, affecting (*a*), (*b*), and (*c*).

3. A charge for £500, created in 1858, affecting (*a*) and (*b*).

4. A charge for £1000, created in 1859, affecting (*b*) only.

5. John Smyth the elder, the then owner, by his will made in 1853, devised (*a*) and (*b*) to trustees, subject to the charges affecting the same, on trust to pay certain annuities to his daughters (including the applicants), and subject thereto to his son, J. J. Smyth, the present owner. John Smyth the elder died in 1872.

6. In 1886 the owner created a mortgage in favour of Eliza Wakeham affecting (*a*), (*b*), and (*c*).

7. Mortgage created by the owner in 1887 in favour of the Munster and Leinster Bank for £1200, affecting (*a*), (*b*), and (*c*).

When (*a*) and (*b*) were sold the incumbrances, Nos. 1–4 (inclusive) were paid off. The redemption of the annuities (No. 5) was ordered, and the redemption prices fixed, but the proceeds of (*a*) and (*b*), after discharging the prior incumbrances, were not sufficient to pay the redemption prices in full, and a considerable amount remained still due to the several annuitants.

The rents (*c*) having been subsequently sold, and the proceeds thereof having come to credit, the annuitants asked for a declaration that they were entitled to marshal, and to throw incumbrances 1 and 2 on to the proceeds of (*c*), and thus leave sufficient of (*a*) and (*b*) to meet their own claims in full, and that the proceeds of (*c*) should now be resorted to for that purpose. The Bank contended that the annuitants were only entitled to the benefit to be derived from pro rata contribution.

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McCarthy Mahony, for the applicants:—

The charges for £2000 and £1000 were incumbrances on (*a*), (*b*), and (*c*), and as they have been entirely paid off out of (*a*) and (*b*), the annuitants are entitled to marshall; *Archer's Estate* (1) is a direct authority on the question.

There are two classes of case—1, cases of marshalling proper, which is an equitable principle arising from the position of the parties; and 2, cases in which an owner of incumbered property conveys away part of it—there the right of the assignee to be indemnified depends on contract. The fundamental authorities on these subjects are: *Aldrich* v. *Cooper* (2); *Averall* v. *Wade* (3); *Barnes* v. *Racster* (4).

The question in the present case is whether the annuitants are precluded from marshalling by reason of the mortgages by the owner to Eliza Wakeham and the bank (Nos. 6 and 7). The rule, as often stated, that the doctrine of marshalling will not be applied to the prejudice of third parties is far too general, and is not justified by the authorities. The foundation of it is to be found in *Aldrich* v. *Cooper* (2), in which Lord Eldon uses the words, "if no third persons are concerned," dealing with the principle of marshalling in its simplest application, where there were no third parties. In *Averall* v. *Wade* (3), Sugden C., referring to the judgment in that case, says (p. 259) that Lord Eldon avoids dealing with the rights of third parties intervening; and again (p. 263), that in *Ex parte Kendall* (5), Lord Eldon was guarded in his observations, and always kept in mind that the rights of third parties could not be affected. In *Averall* v. *Wade* (3) it was the claimants third in point of time who sought to marshall against those second in time; and it was held that they were not entitled to do so. Here the second incumbrancers claim to marshall against the third—a very different matter. The other question decided in *Averall* v. *Wade* (3) comes under the second class of case; so far as it has any bearing on the present, the decision is in the annuitants' favour.

(1) [1914] 1 I. R. 285.
(2) 8 Ves. 382.
(3) L. & G. temp. Sugden, 252.
(4) 1 Y. & C. Ch. 401.
(5) 17 Ves. 514.

Again, in *Barnes* v. *Racster* (1), Hartwright, the second incumbrancer on Foxhall, claimed to marshall as against Williams, the fourth incumbrancer, whose charge was on Foxhall and No. 32. But in that case, at the time of Hartwright's mortgage, Barnes (the first incumbrancer) also had a mortgage on Foxhall alone, so that when Hartwright took his security he obtained no right direct or indirect against No. 32. It was only the accident that subsequently Barnes' second mortgage included No. 32 that would have given Hartwright any claim at all against that property. The Vice-Chancellor, referring to the contentions of Hartwright and Williams, says (p. 408): "This is the question to be decided, and I think that it may be decided without necessarily involving either of two other points to which the argument has extended itself, I mean, first, the question, What would have been the rights of Hartwright and Williams had Barnes's security upon No. 32 preceded and not been subsequent to Hartwright's security on Foxhall . . . . Upon each of these two points I entirely reserve myself."

In the present case, on the death of the testator the annuitants acquired a right in case the prior charges, which were incumbrances on the townlands and rents, should be at any time paid out of the former, to be recouped out of the rents, and nothing that the owner could subsequently do could affect that right: *Mutual Life Assurance Society* v. *Langley* (2). See the judgments of Cotton L.J., pp. 466, 467, Bowen L.J., p. 470, and Fry L.J., pp. 472, 473.

Here the devise of the lands was expressly subject to the charges affecting the same, and the earliest of those charges affected both lands and rents, so that any person dealing with the owner had full notice of the entire position of things. The owner, moreover, took expressly subject to the annuities.

It is sometimes stated that in questions of marshalling notice is immaterial. This applies only to the second incumbrancer; notice of the first charge does not prevent his right to marshall.

In *Aldridge* v. *Forbes* (3) the head-note may be too general, but there, although the second mortgage provided that it should

(1) 1 Y. & C. Ch. 401.

(2) 32 Ch. D. 460.

(3) 4 Jur. 20.

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not affect the rights under the earlier settlement, that settlement was itself made expressly subject to the first mortgage.

Norwood K.C., for the Munster and Leinster Bank :—

I submit that when the first charges were being paid off, (*c*) should have contributed rateably. In so far as they did not do so, the amount that they should have contributed, and that only, is available to satisfy the annuitants. *Archer's Estate* (1) should not be followed. That decision was founded on principles which do not apply to the present case; nor were two decisions, which are on all fours with the present case, cited to Wylie J. When an owner of two properties mortgages both to A, and one of them to B, the latter is entitled to throw A on the one on which he is not. But if there are three incumbrancers, A, B, and C, and both properties are mortgaged to A, one of them to B, and both to C, then A must resort to both rateably, B to his own, and C takes his chance of both. What I may call "the rule of three securities," as exemplified in the *Barnes* v. *Racster* (2) class of case, is an exception to the doctrine of marshalling, and is an application of the rule in equity that equality is equity. That class of case must be distinguished from what I call the "severance cases," of which *Averall* v. *Wade* (3) is an example. In these latter cases, when an owner of an incumbered estate conveys part of it exonerated from overriding charges, then, when the overriding charges come to be paid off, the question arises, can the assignee throw the charges on the portion retained by the assignor? [He referred to Halsbury's Laws of England, vol. xxi, p. 306, § 545.] In cases like *Barnes* v. *Racster* (2) and the present case, it is quite immaterial whether an incumbrancer had notice of preceding incumbrances. In the "severance cases" four elements must be considered— 1. Did the owner create the charges? 2. Was there a covenant against incumbrances? 3. Was the property assigned for value? 4. Was the subsequent purchaser of the other property a purchaser for value and without notice? When severance occurs and an assignee is exonerated, he has the right to throw the charges on the other property till the latter gets into the hands of a purchaser for value

(1) [1914] 1 I. R. 285. (2) 1 Y. & C. Ch. 401.
(3) L. & G. temp. Sugden, 252.

without notice: *Ocean Accident, &c., Corporation* v. *Collum* (1). *Averall* v. *Wade* (2) is a "severance" case, decided on principles applying to such. The judgment of Sugden C. seems to have been founded on the doctrine of specific performance: see also the judgment of Christian L.J. in *Ker* v. *Ker* (3). *Roche's Estate* (4) is also in point. *Archer's Estate* (5) was treated as if it was a "severance" case, but it was not. There are two cases absolutely in point, which were not cited to Wylie J.: *Wellesley* v. *Lord Mornington* (6) and *Baglioni* v. *Cavalli* (7). In both of them the principle of contribution (as distinguished from marshalling), for which I contend, was applied. *The Mutual Life Assurance Society* v. *Langley* (8) is a case of foreclosure, and has nothing to do with marshalling.

Mahony, in reply:—

The grounds of the decision in *The Ocean Accident, &c., Corporation* v. *Collum* (1) do not apply here. There the first purchaser had merely a covenant: he had no charge on or right against the remaining lands. Here the annuitants acquired a specific right as against the rents. *Ker* v. *Ker* (3) and *Roche's Estate* (4) come under the second class of case. In *In re Lysaght's Estate* (9) the policies of insurance were not in the mortgage vested in Foley and his co-trustee. *Flint* v. *Howard* (10) turned on the effect of the deed of 1885. There the plaintiff did not claim more than an apportionment. There is no decision that he had no higher right; nor is there any decision as to what would have been the effect of notice, as in the present case. *Wellesley* v. *Lord Mornington* (6) was argued on the assumption that *Barnes* v. *Raester* (11) was exactly in point, and the Court was asked not to follow it. This Lord Hatherley declined to do; but his judgment shows great doubt as to its correctness. For the reasons already stated *Barnes* v. *Raester* (11) does not apply here, and, accordingly, *Wellesley* v. *Lord Mornington* (6) does not carry

(1) [1913] 1 I. R. 337.
(2) L. & G. temp. Sugden, 252.
(3) I. R. 4 Eq. 15, 30.
(4) 25 L. R. Ir. 271.
(5) [1914] 1 I. R. 285.
(6) 17 W. R. 355.
(7) 49 W. R. 236.
(8) 32 Ch. D. 460.
(9) [1903] 1 I. R. 235.
(10) [1893] 2 Ch. 54.
(11) 1 Y. & C. Ch. 401.

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the bank's case farther. The same applies to *Baglioni* v. *Cavalli* (1). In *Bugden* v. *Bignold* (2) the third incumbrancer had no notice of the second.

Ross J., having stated the facts, proceeded as follows:—

The doctrine of marshalling has been discussed by the learned counsel in the most elaborate manner. It is not necessary for me to go over the entire ground covered by the argument. If there had been no subsequent mortgages to the bank and Wakeham, it is clear that the annuitants charged on 1 and 2 would have been entitled to throw over the prior charges on to No. 3. But what happens when No. 3 is subsequently mortgaged to a party with notice? On this the authorities are conflicting. In *Flint* v. *Howard* (3) Kay L.J. puts the matter thus:—"In *Gibson* v. *Seagrim* (4) Lord Romilly stated the law thus: 'If two estates are mortgaged to A, and one is afterwards mortgaged to B, and the remaining estate is afterwards mortgaged to C, B has no equity to throw the whole of A's mortgage on C's estate, and so destroy C's security. As between B and C, A is bound to satisfy himself the principal, interest, and costs due him out of the two estates rateably, according to the respective values of such two estates, and thus to leave the surplus proceeds of each estate to be applied in payment of the respective incumbrances thereon.' As so stated the rule is independent of the question whether C had notice of A's mortgage or not. I am not satisfied that the rights of B and C to have A's mortgage debt apportioned depends on whether C, when he took his security, had notice of A's mortgage. If it had been decided that, after the mortgage of one of the properties to B, the mortgagor could not alter B's position by mortgaging the other to C, that would be intelligible. B would then have against C the same right which he had against the mortgagor, viz., to throw A's mortgage debt upon the property mortgaged to C. That is not so where C had no notice of A's mortgage. Why should notice of that mortgage alter the right of C as against B? The true ground seems to me to be

(1) 49 W. R. 236.
(2) 2 Y. & C. Ch. 377.
(3) [1893] 2 Ch. 54, at p. 72.
(4) 20 Beav. 614, 619.

indicated in *Averall* v. *Wade* (1) and other cases. The right of a subsequent mortgagee of one of the estates to marshal—that is, to throw the prior charge on both estates upon that which is not mortgaged to him—is an equity which is not enforced against third parties, that is, against anyone except the mortgagor and his legal representatives claiming as volunteers under him. It is not enforced against a mortgagee or purchaser of the other estate. If both estates are subject to a separate second mortgage the Court apportions the first mortgage between them." All this is a distinct authority in favour of the bank's contention.

I now turn to Mr. Justice Wylie's recent decision in *Archer's Estate* (2). Here we have Barker entitled to a first charge on two funds, A and B; Cooper entitled to a second charge on B only. Barker took a further charge on funds A and B; and after that La Touche acquired a charge on A only. Each had notice of all the prior charges. It was held that Cooper was entitled to marshal Barker's first charge, and to have so much paid out of fund A as would leave sufficient of fund B to pay his own second charge in full, notwithstanding the fact that La Touche's puisne charge would be thereby prejudiced.

I cannot distinguish this case in principle from the case before me, and it is a distinct authority in favour of the annuitants' contention. Mr. Justice Wylie says, p. 289:—"What was the right or equity of Cooper at the time Barker took his second mortgage? He clearly had a right to marshal Barker's first mortgage, and the mortgagor could not create a further charge on A so as to prejudice that right. . . . In the same way, the mortgagor could not by a subsequent mortgage to Miss La Touche, affect or prejudice the then existing rights of Cooper and Barker of which she had notice." I cannot see how this can be reconciled with the language of Knight Bruce, V.-C., in *Barnes* v. *Racster* (3):—"I am unable to see that Hartwright [the person in Cooper's position] had in or before 1804 [when Williams—the person in La Touche's position—took his security] acquired any right in No. 32 [the property mortgaged to Williams] or any equity against Racster to preclude him from dealing with it on that footing for any

(1) L. & G. temp. Sugden, 252. (2) [1914] 1 I. R. 285.
(3) 1 Y. & C. Ch. 401, 408.

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purpose that his necessities might require. Contract, certainly, as to No. 32, Hartwright had none."

There are two most important cases that unfortunately were not cited before Mr. Justice Wylie. The first of these is *Wellesley* v. *Lord Mornington* (1), where Lord Hatherley says as follows:—"There is a great deal to be said in favour of an argument which went to a great extent upon this—that the person taking the third mortgage must take it subject to all the interest to which the mortgagor himself would be subject. . . . As to the rights of marshalling, the parties are standing exactly in this position:—the mortgagor has mortgaged two estates; the man who has the second mortgage does not choose to make himself master of one which he might obtain if he pleased. If one gets a security for himself which another does not care to obtain, why should he be deprived of the benefit of it? . . . I do not see why he should be deprived of the security he has so acquired, by an equity, reasonable enough as between the original mortgagor and mortgagee." The second case not cited to Mr. Justice Wylie is *Baglioni* v. *Cavalli* (2), a decision of Lord Cozens-Hardy, in which he adopts the passage I have referred to in the judgment of Kay L.J., in *Flint* v. *Howard* (3). I am quite unable to distinguish these cases, which are of the very highest authority, from *Archer's Estate* (4) and from the case before me. If they had been cited to Mr. Justice Wylie and distinguished by him, I should have been glad to have followed his decision. But, finding them both in direct conflict with his decision, I think I am free to act on my own view, and it is briefly this:—The rationale of the doctrine is specific performance, as laid down by Christian L.J. in *Ker* v. *Ker* (5). It is reasonable to throw the whole of the first charge affecting two properties on the one not mortgaged to the second mortgagee as against the mortgagor and his representatives claiming as volunteers under him. But when once the mortgagor has handed over the second property to a mortgagee or purchaser, it is wholly unreasonable and impossible to enforce specific performance against such mortgagee or purchaser. Where you cannot

(1) 17 W. R. 355, 356.
(2) 49 W. R. 236.
(3) [1893] 2 Ch. 54.
(4) [1914] 1 I. R. 285.
(5) 1 I. R. 4 Eq. 15.

have specific performance, you cannot marshal. In respect of the properties Nos. 1 and 2, on which these annuities are charged, the owner could not prejudice the security; but in the case of No. 3, on which these were not charged, the annuitants acquired no right or equity to preclude the owner from mortgaging it to the Bank and Wakeham.

I am therefore of opinion that the annuitants have no right to marshal, but only the right to have an apportionment pro rata made between the respective properties.

Solicitor for the annuitants: *Arthur Julian.*

Solicitor for the Munster and Leinster Bank: *T. G. Wallis.*

T. C. T.

IN RE QUIGLEY AND M'CLAY'S CONTRACT.

Vendor and purchaser—Conditions of sale—Litigation—Objection to title by purchaser upheld by the Court—Rescission.

A condition of sale providing that "if the purchaser shall insist on any objection or requisition which the vendor shall be unable or unwilling to remove or comply with, the vendor may . . . at any time thereafter, and notwithstanding any negotiation or litigation in respect of such objection or requisition, or attempts to remove or comply with the same, annul the sale, and shall thereupon return to the purchaser his deposit, but without any interest, costs, or other compensation whatsoever," does not entitle a vendor to rescind without compensation after the purchaser's requisition has been upheld by a judicial decision.

In re Arbib and Class's Contract ([1891] 1 Ch. 601) followed.

SUMMONS.

Certain premises in the town of Cookstown were put up for sale by the vendor, Mary Kate Quigley, as the administratrix of Joseph Quigley, who died on the 22nd April, 1903, intestate, leaving his widow the vendor, and two children, who were infants, him surviving. The seventh condition of sale provided in the usual form that "if the purchaser shall insist on any objection or requisition which the vendor shall be unable or unwilling to remove or comply with, the vendor may . . . at any time thereafter, and notwithstanding any negotiation or litigation

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In re Quigley & M'Clay's Contract.

in respect of such objection or requisition, or attempts to remove or comply with the same, annul the sale, and shall thereupon return to the purchaser his deposit, but without any interest, costs, or other compensation whatsoever." The premises, which formed part of the estate of Joseph Quigley, were held, with other premises, under a lease for ninety-nine years from the 1st November, 1846, at the yearly rent of £20. The vendor, as part of her title to the premises, furnished to the purchaser a deed, dated the 4th May, 1907, and made between herself, of the one part, and James Duncan Hodge, of the other part, whereby, after reciting that she had valued the assets of the said Joseph Quigley at the sum of £652 5*s.*, and the share of each of her children at £217 15*s.*, and that she had insured her own life for £600, she assigned the policy to the said James Duncan Hodge as security for the distributive shares of her children, and charged the premises sold with the payment of the premiums thereon. The purchaser having objected to the title on the ground that this deed constituted a breach of trust by the vendor, the vendor took out a summons asking for a declaration that a good title to the premises had been shown. By the order, dated the 13th November, 1917, made on the hearing of this summons, it was declared that a good title had not been shown. The purchaser expressed his willingness to complete provided that a suit for the administration of Joseph Quigley's estate was instituted and the premises sold under the order of the Court, but the vendor would not agree to this, and on the 9th April, 1918, purported to rescind the contract under condition 7 and returned the purchaser his deposit. The present summons was brought by the purchaser for a declaration that the vendor was not entitled to rescind the contract.

Wylie K.C., for the purchaser :—

The vendor is not entitled to rescind the contract under condition 7 ; "litigation" in the condition does not include a final judicial decision : *In re Arbib and Class's Contract* (1).

(1) [1891] 1 Ch. 601.

Serjeant Matheson K.C., for the vendor :—

The decision in *Arbib's Case* (1) was that the vendor there had no right to sell; that decision went to the root of the matter, but the order of the 13th November, 1917, in this case was not to that effect. The deed of the 4th May, 1907, was not an appropriation by the vendor of the assets of the deceased to herself, but was only intended to secure the payment of their distributive shares to the children.

O'CONNOR M.R. :—

In my opinion the condition of sale relied on by counsel for the vendor does not entitle her to rescind the contract for the reasons stated by North J. in *In re Arbib and Class's Contract* (1), and I shall declare accordingly.

Solicitor for the purchaser: *David H. Charles.*
Solicitor for the vendor: *John Malone.*

A. H. W.

(1) [1891] 1 Ch. 601.

Ross J.
1918.
April 26.
May 10.

BURKE IRWIN'S TRUSTS.
BARRETT *v.* BARRETT.

Will—Appointment of definite sums and a "balance"—Lapse of appointed sum—Inclusion of in "balance."

By a marriage settlement and a contemporaneous deed certain stocks and shares (the particulars and values whereof were set out in the settlement) and certain shares in a Mexican Hacienda were transferred to trustees upon trust, after the wife's death, and in the events that happened, for her brothers and sisters, or their issue, in such shares as she should by will appoint, and in default of appointment for the persons who would have been entitled thereto under the Statute of Distributions on the wife's death if she had died possessed thereof intestate, as tenants in common.

The wife by her will directed and appointed that the trustees should after her decease stand possessed of the said property in trust to pay to her sister E. £2,000 and to her sister B. £1,000, and as to the balance of the trust funds to hold the same for her brother M. and the said E. in equal shares. B. died in the testatrix's lifetime and the appointment of the £1,000 to her lapsed.

Held, that the £1,000 passed to M. and E. as part of the "balance," and did not devolve as in default of appointment.

ORIGINATING SUMMONS.

By a settlement, dated the 30th July, 1902, executed on the marriage of Joseph Burke Irwin and Sarah Elizabeth Barrett, certain shares, stocks, and securities in the schedule thereto mentioned were transferred to trustees, in trust to pay the income to the wife for life, and after her decease to hold the trust funds for the children or issue of the marriage, and, in the events that happened, for the wife's brothers or sisters, or issue of a brother or sister, in such shares as the wife should by will appoint, and in default of appointment in trust for the persons who under the Statute of Distributions if she had died possessed thereof intestate would have been entitled thereto on the wife's decease intestate, as tenants in common. The settlement contained a declaration as to after-acquired property.

A trust deed was also executed on the same day wherein it was declared that Sarah Barrett, the wife's mother, Michael

Francis Barrett, her brother, and Ethel Charlotte Barrett, her sister, and the trustees for the time being thereof, should stand possessed of forty-three shares in the Guadaloupe Hacienda in Mexico in trust in the events that happened for the wife's brothers and sisters, or the issue of a brother or sister, in such shares as the wife should by will appoint, and in default of appointment upon trust for the persons who under the Statute of Distributions would have been entitled thereto on the decease of the wife intestate as tenants in common. There was no issue of the marriage.

Sarah Elizabeth Burke Irwin made her will, dated the 27th May, 1916, and thereby, in exercise of the said powers of appointment, she directed and appointed that the trustees of the said indenture should, after her decease, stand possessed of all moneys, stocks, funds, and securities subject to the trust thereof in trust to pay her sister, Ethel Charlotte Barrett, the sum of £2000, and to pay her sister, Beatrice Sumner, the sum of £1000, and as to the balance of the trust funds thereby appointed upon trust to hold the same in trust for her brother, Michael Francis Barrett, and her sister, Ethel Charlotte Barrett, in equal shares as tenants in common absolutely.

Beatrice Sumner died after the date of the said will, in the lifetime of the testatrix, leaving her husband, Francis G. Sumner, and three children, John, William, and Mary, all under twenty-one. The testatrix died on the 18th December, 1916, and probate of her will was granted to her executors. The testatrix had two other brothers, John and Frederick, who survived her, and they, with Michael, Ethel, and the children of Beatrice, were the only persons entitled in distribution. The appointment of the £1000 in favour of Beatrice failed by reason of her death in the lifetime of the testatrix, and the question for determination was, whether it fell into the balance of the trust funds appointed to Michael Barrett and Ethel Barrett, or was unappointed. The value of the stocks and shares specifically mentioned in the schedule to the marriage settlement was then estimated at £12,307 10s. The value of the Mexican property was unknown.

The plaintiffs as trustees of the settlement and deed took out this summons for the determination of the question whether in

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the events that had happened the said sum of £1,000 fell into and was included in the appointment of "the balance," or whether it was unappointed.

The defendants were the said John and Frederick, and the children of Beatrice Sumner.

McCarthy Mahony, for the plaintiffs as trustees.

Norwood K.C., for the plaintiffs, Michael Francis Barrett, and Ethel Charlotte Barrett, as residuary appointees:—

In 1916, when the appointment was made, the value of all the property had greatly depreciated; and even in the year 1902, when the trust deed was executed, the value of the Mexican property was not ascertained. When definite charges are put on a fund that is not itself definite, and provision is made for a residue or "balance," a lapsed share is included in such residue or "balance." In *Easum* v. *Appleford* (1) the residuary gift was "the residue of the said stocks and securities, constituting the remainder of the said trust funds." That case was affirmed on appeal by Lord Cottenham C. (2), who distinguished *Oke* v. *Heath* (3) and *Malcolm* v. *Taylor* (4). In that case also the fund consisted of £3,000 stock. [He also cited—*Harries' Trust* (5); *Jeaffreson's Trusts* (6); *Falkner* v. *Butler* (7); *Carter* v. *Taggart* (8); *Champney* v. *Davey* (9).

Pigot K.C., for the defendants:—

The propositions of Sir William Page Wood V.-C., in the *Harries' Trust* (5) are not exhaustive. In *Easum* v. *Appleford* (1) the fund of £3,000 included accumulations. The donee of the power knew neither the nominal amount nor actual value of the sum which she was appointing. The residue was not a certain sum, nevertheless Lord Cottenham held that it was sufficiently

(1) 10 Sim. 274.
(2) 5 My. & Cr. 56.
(3) 1 Ves. Sen. 135.
(4) 2 Russ. & M. 416.
(5) John. 199.
(6) L. R. 2 Eq. 276.
(7) 1 Ambler, 514.
(8) 16 Sim. 423.
(9) 11 Ch. D. 949, 958.

specific. *Page* v. *Leapingwell* (1) is an unsatisfactory decision. In *Ratcliffe* v. *Hampson* (2) a direction to sell an estate in lands, the value of which was uncertain, was held specific as to the residue. *Swete* v. *Tindal* (3) was a case of the sale of securities, as here. In *Bjorkman* v. *Kimberley* (4), though the surplus or residue was of unknown value, it was held that there was no lapse, a decision which was based on intention, which, it is submitted, is the true and only test. It is submitted that, where intention is not otherwise absolutely clear, if there is an ascertained trust fund and a direction to deal with a sum out of it in a certain way, and to give the balance, surplus, overplus, or residue to another after making that payment, such balance, &c., is specific, and does not capture a lapsed appointed share. The rule is the same in construction of appointments by will as in cases of legacies. The intention here is sufficiently clear—that balance does not mean residue.

Cur. adv. vult.

May 10.

Ross J.:—

This matter comes before me on a summons to determine who are entitled to the sum of £1,000 appointed by the will of Sara E. Burke Irwin in favour of Beatrice Sumner. [His lordship, having stated the facts as above set out, proceeded as follows:—]

If, apart from authority, I were free to decide what the testatrix intended, I should hold that by the word "balance" the testatrix never intended to appoint the whole fund to her brother Michael and her sister Ethel in the event of a failure of the appointment of the £1,000. I think a balance means what remains after something has been taken out of the fund. It is not, however, open to me to declare what I think was the intention of the testatrix having regard to the authorities. No distinction is taken between the word "balance" and the word "residue."

In *In re Harries' Trust* (5) Sir Page Wood V.-C. says after carefully examining the authorities that there is a general principle to be derived from them. If there is a definite fund subject to

(1) 18 Ves. 463.
(2) 1 Jur. (N. S.) 1104.
(3) 31 L. T. 223.
(4) 36 W. R. 752.
(5) John. 199, at p. 204.

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a power of appointment by will, and a will appointing one sum, part of the fund, to one person and another sum, part of it, to another and all the remainder to a third, the third appointee cannot claim a lapsed share. Thus if the fund be £3,000, and £1,000 is appointed to A, and another £1,000 is appointed to B, and all the residue of the fund is appointed to C, the residue is to be read as if it were the remaining £1,000, and will not carry a share that has lapsed. Then we have another class of cases where the fund is not a definite fund. On this fund certain definite charges are placed, and a residue or balance is given to another party. In this case the word "residue" or "balance" will carry a lapsed share or legacy.

A residuary gift will in general carry a lapsed legacy. When I say in general, I mean when there are no words in the will defining or qualifying the word "residue" or "balance." The same rule applies in the case of an appointment by will. Now, probably, the testator or donee of the power contemplated nothing beyond the particular legacy or appointment taking effect. But it is now a well-settled rule of construction that the residuary clause is understood to be intended to embrace everything not effectually given. In short, it means this: "If anything I have given by my will fails, I mean to sweep into this residuary gift all that may so fail." In the first class of cases the word "residue" or "balance" has not this meaning: it means a specific sum in moneys numbered. The rule is best expressed in the language of Kay J., in *Bjorkman* v. *Kimberley* (1). Where "definite portions of a definite fund are given to certain persons, and then the residue of that fund is given to somebody else," the doctrine is that "the sum thus described as residue is as much a definite sum as any other part of the fund, and that it is not residue in the ordinary sense."

There is nothing in general so unprofitable as the consideration of cases interpreting the wills of other testators, and by this means interpreting the intention of a particular testator. However, from a consideration of the cases, a general principle or rule of construction may be arrived at. I have not attempted to go

(1) 36 W. R. 752.

through the details of the numerous cases cited. I have only attempted to state the rule to be extracted from the cases.

It only remains to consider under which category the present case falls. No doubt in the schedule to the deed of the 30th of July, 1902, the shares and their value at the time are set out with precision. But, on the other hand, the trust deed of the same day dealt with the shares in Mexican property, the value of which was at that time quite uncertain. The appointment was made in May, 1916, when, owing to the war and other circumstances, the value of all the property dealt with had depreciated enormously. The balance then could only be an indefinite floating surplus. For these reasons I am of opinion that the £1000 is to be included in the balance.

Solicitor for the trustees: *M. C. O'Meara.*

Solicitor for Michael F. Barrett and Ethel C. Barrett: *W. Morrogh.*

Solicitor for the defendants: *S. G. Rutherford.*

T. C. T.

M. R. 1918.

May 14.

In re QUEENSTOWN DRY DOCKS SHIPBUILDING AND ENGINEERING COMPANY.

Company—Winding-up—Leaseholds—Mortgage by sub-demise to trustee for debenture-holders—Sale by trustee—Dissolution of company—Nominal reversion outstanding—Appointment of new trustee—Vesting order—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *s.* 25, *sub-s.* 1, *and s.* 26.

A company held certain premises as assignees under several leases. These premises were mortgaged by sub-demise to a trustee for debenture-holders of the company, leaving outstanding in the company the last three days of the terms for which they were held, with the usual declaration of trust of such reversions. The trustee for the debenture-holders sold the premises under the power of sale in the trust deed, and subsequently the company was dissolved, without an assignment of the nominal reversion vested in it having been obtained. The premises having become vested in the applicants, subject to the outstanding nominal reversions, they applied, under sect. 25, sub-s. 1, of the Trustee Act, 1893, to be appointed trustees of such reversions, and for an order vesting the same in them.

Held that the application should be granted. Form of order considered. *In re No.* 9 *Bomore Road* ([1906] 1 Ch. 359) followed.

Originating Notice of Motion.

Certain premises, held under twelve leases, became vested in the Queenstown Dry Dock Shipbuilding and Engineering Company. By an indenture, dated the 1st February, 1907, these premises were demised for the residue of the respective terms for which they were held save the last three days thereof to a trustee for the debenture-holders of the company; and it was declared that the company would hold such reversions in trust for the trustee and his assigns. The trustee sold the premises under the power of sale contained in the debenture trust deed, and subsequently the company was dissolved without any assignment of the nominal reversions outstanding in it having been obtained. A new company, called the Queenstown Dry Docks Shipbuilding and Engineering Company, having acquired the premises, and being desirous of surrendering two of the leases to the lessor for the purpose of obtaining a new lease, the present application was brought for an order appointing the applicants (the new company)

trustees of the premises for all the purposes for which the old company were by the indenture of the 1st February, 1907, declared to be trustees, or for such of the same as were subsisting and capable of taking effect; and for an order that the said premises should vest in the applicants for all the estate and interest vested in the old company immediately before its dissolution upon the trusts upon which the same were held by the old company; or alternatively for an order that the said premises should vest in the applicants as the sole beneficiaries interested therein by virtue of the said indentures and in the events that had happened for all the estate and interest vested in the old company immediately before its dissolution.

Poole, for the applicants:—

The question is what form the order should take. In *In re General Accident Assurance Corporation* (1), and *In re Richard Mills & Co.* (*Brierly Hill*), *Ltd.* (2), Farwell J. held that the property was vested in a trustee who could not be found, and made vesting orders under sect. 35 of the Trustee Act, 1893. In *In re Taylor's Agreement Trusts* (3), a case of a patent, Buckley J. held that it was not a case of a trustee who could not be found, for that presupposed the existence of a trustee, and that therefore a vesting order could not be made under sect. 35, and that the patent having vested in the Crown, an order could not be made under sect. 25. In *In re No. 9 Bomore Road* (4), where leaseholds were assigned to a company which went into liquidation and transferred its assets to a new company, but by inadvertence no assignment of the leasehold was executed, Warrington J. appointed a new trustee on the ground that it was "expedient to appoint a new trustee" under sect. 25, sub-s. 1. The notice of motion has not been served on anyone; in *In re No. 9 Bomore Road* (4) there was no service; in *In re Albert Road, Norwood* (5) Petersen J., having regard to the decision in *Hastings Corporation* v. *Letton* (6), that a lease to a corporation determines upon the dissolution of the corporation and the lessor's reversion is accelerated, directed

(1) [1904] 1 Ch. 147.
(2) [1905] W. N. 36.
(3) [1904] 2 Ch. 737.
(4) [1906] 1 Ch. 359.
(5) [1916] 1 Ch. 289.
(6) [1908] 1 K. B. 378.

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In re Queenstown Dry Docks Ship-building Co.

service on the reversioner. According to Williams, Vendor and Purchaser, 2nd ed., p. 964, on the dissolution of a corporation tenant for years the land should vest in the Crown as bona vacantia for the rest of the term. [*In re Ruddington Land* (1) was also referred to.]

O'Connor M.R.:—

I think that this case comes within the principle of Warrington J.'s decision in *In re No. 9 Bomore Road* (2). The decision in *In re Albert Road, Norwood* (3) proceeds on the assumption that the reversion was vested in the original lessor, but that is different from the present case, for there the dissolved company were the original lessees. I will make an order in the form of that made by Warrington J. in *In re No. 9 Bomore Road* (2), following the terms of the first part of the notice of motion.

Solicitors for the applicants: *D. & T. FitzGerald.*

A. H. W.

(1) [1909] 1 Ch. 701. (2) [1906] 1 Ch. 359.
(3) [1916] 1 Ch. 289.

IN RE DONOUGHMORE AND HACKETT'S CONTRACT.

M. R.
1918
May 1.

Vendor and Purchaser—Vendor trustee—Delegation of trust—5 Geo. 5, c. 13, sect. 1, sub-s. 1—Power of Attorney.

Certain premises were put up for sale by auction, the vendors being trustees. One of the vendors being absent on war service, it was proposed that the conveyance to the purchaser should be executed by a person to whom he had purported to delegate the execution of trusts, of which he was a trustee, under the Execution of Trusts (War Facilities) Act, 1914 (5 Geo. 5, c. 13), sect. 1, sub-s. 1. The power of attorney by which the delegation purported to be carried out, though referring to the Act, was in general terms, did not mention the particular settlement in which the premises in question were comprised, and did not deal or purport to deal with realty in any way. The purchaser having objected that the power of attorney was insufficient to enable the conveyance to him to be executed in the manner proposed:

Held, that the objection was well founded.

Certain premises in Dungarvan were offered for sale by public auction on the 8th November, 1917, and were bought by the purchaser for £1610. The conditions of sale stated that the vendors were trustees for the purposes of the Settled Land Acts, 1882–1890, and also for the purposes of the Conveyancing Act, 1881, of a settlement dated the 4th January, 1897, under which the Marquis of Waterford, who was an infant, was tenant in tail male of (amongst others) the premises sold, subject to a lease which it was provided should be surrendered to the vendors prior to the execution of the conveyance to the purchaser. Subsequent to the sale one of the vendors, the Earl of Donoughmore, left England for India on war service, having before leaving executed a delegation of trusts and power of attorney under the Execution of Trusts (War Facilities) Act, 1915, in the following terms:—"Whereas I am trustee of certain settlements and have the powers of a tenant-for-life within the meaning of the Settled Land Acts, 1882–1890, under certain other settlements And whereas I am about to proceed to India on war service within the meaning of the Execution of Trusts (War Facilities) Acts, 1914 and 1915, Now know ye that I hereby appoint my wife, Elena Maria, Countess of Donoughmore, of 5 Chesterfield Gardens, in the county of London, to be my Attorney for me and in my name whether on my own

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In re Donoughmore and Hackett's Contract.

behalf personally or as a trustee both solely and jointly with others to do any of the acts or things hereinafter mentioned and I also delegate the execution of the trusts of any of the before-mentioned settlements to my said Attorney accordingly . . ." The Power of Attorney then proceeded to enumerate in eighteen numbered paragraphs certain specific powers relating to the donor's own affairs, but not referring to the settlements of which he was trustee nor to the sale of land, and concluded: "And I hereby undertake to ratify everything which my Attorney or any agent or agents appointed by her under the power in that behalf hereinbefore contained shall do or purport to do in virtue of these presents and I hereby declare that this power shall continue in force during such time as I shall be engaged in war service as aforesaid and also for such period as I am for any reason connected with the present war unable to return permanently from abroad to the United Kingdom and for the further period of one month thereafter or until notice of my death or of any other revocation hereof shall be actually received by my said Attorney." It was proposed that the Countess of Donoughmore should execute the conveyance to the purchaser on behalf of her husband, but the purchaser, on being furnished with a copy of the Power of Attorney, made the following requisition:—"The purchaser objects that this Power of Attorney is not sufficient for the purpose apparently intended in furnishing it. Apart from the extreme generality of the Power (which does not mention the Waterford or any other settlement in particular), the Power only enables dealings with money investments in terms, and does not deal, or purport to deal, with realty in any way. It is therefore submitted that either the Earl of Donoughmore must himself execute the conveyance to the purchaser, or a better Power of Attorney under the Acts applicable to the present case must be procured." The purchaser having persisted in this objection, the present summons was taken out by the vendors for a declaration that the above requisition had been sufficiently complied with and a good title shown.

G. W. Walker K.C. (with him *Walsh*), for the vendors.

Hugh Kennedy, for the purchaser.

O'CONNOR M.R.:—

In my opinion the purchaser was right in his objection. There is no mention of the Waterford settlement in the Power of Attorney, nor anything to show that either that settlement or the present sale was in any way present to Lord Donoughmore's mind when he executed it.

Solicitors for the vendors: *M'Mahon & Tweedy.*
Solicitor for the purchaser: *E. P. Williams.*

A. H. W.

Execution of Trusts (War Facilities) Act, 1914, sect. 1, sub-s. 1:—

A trustee (whether a sole trustee or a trustee with others) may, notwithstanding any rule of law or equity to the contrary, by power of attorney, attested by one or more witnesses, delegate to any person capable of being appointed to be a trustee of the trust the execution during any period for which the trustee is engaged on war service within the meaning of this Act, and a further period of one month thereafter, of any trust of which he is a trustee.

M. R.
1918.
June 5.

In re EARL OF PORTARLINGTON'S SETTLED ESTATES.

(1918. No. 438.)

Settled land — Capital money — Investment — Sporting rights — Incorporeal hereditament — Privilege convenient to be held with the settled land — Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 10 (i), *s.* 21 (vii) (viii).

Capital money may in a proper case be invested in the purchase of sporting rights, such rights being a privilege convenient to be held with the settled land within the meaning of sect. 21 (viii) of the Settled Land Act, 1882.

Query whether sporting rights are incorporeal hereditaments which can be purchased with capital money as being a purchase of "land in fee-simple" within the meaning of sect. 21 (vii) of the Act.

Summons.

This was an application on the part of the Earl of Portarlington, of Emo Park, in the Queen's County, the tenant for life under a settlement of February 1st, 1907, for an order determining the question whether the application by the trustees of the settlement, by the direction of the applicant as tenant for life, of the sum of £243 capital money, representing portion of the redemption price of an apportioned fee-farm rent of £144 19*s.* 10*d.*, portion of the Lordship of Lea estate in the Queen's County, settled by the said settlement, in the purchase of the exclusive right in perpetuity of hunting, shooting, fishing, and sporting over the lands of Kilbride and Garryvacaun, containing 417 acres or thereabouts, in the said county, was an application of capital money authorized by the Settled Land Acts.

The facts of the case were as follows:—The owners of the lands of Kilbride Lough and Garryvacaun, which were subject to the said fee-farm rent payable to the Earl of Portarlington, by lease, dated January 25th, 1907, demised to him the exclusive right of hunting, shooting, fishing, and sporting over the said lands for a term of twenty years, at the yearly rent of £12. The lease contained a proviso that if and when the lands should be sold under the Land Purchase Acts the lessee should purchase the

sporting rights in perpetuity for a sum to be paid in cash by the lessee to the lessors or other the parties entitled to the purchase-money of the lands, and to be calculated at the same number of years' purchase of the said rent of £12 as the fee-farm rent payable by the lessors to the lessee in respect of his superior interest in the said lands should be redeemed at. The Earl of Portarlington at that time was absolute owner of the said fee-farm rent, which was afterwards included in the said settlement of February 1st, 1907, made upon his marriage. The said lands were afterwards sold to the tenants under the Land Purchase Acts, the sporting rights being reserved. The fee-farm rent was redeemed by order of Mr. Justice Ross, dated February 8th, 1918, at a sum equal to twenty and a-half years' purchase of the said rent, and the purchase-money paid to the trustees of the settlement. The lands so sold adjoined the demesne of Emo Park, which comprised the principal portion of the Emo Park settled estates, and contained about 2000 acres, and its principal value was as a sporting estate. These sporting rights had, prior to 1907, been rented by the Earls of Portarlington. The Earl requested the trustees to apply the said sum of £243 out of the redemption price of the said fee-farm rent in the purchase of the said rights at the like number of years' purchase of the said rent of £12. The Earl and his estate agent were of opinion that in the interests of the settled estate and those entitled to it the said rights should be acquired, as they formed a valuable adjunct to the settled estate, and their possession increased the amenity and value of Emo Park as a sporting estate; and the acquisition of these rights by other persons would probably interfere with the Earl's rights of preserving, and tend to increase trespass on and interference with the lands in his hands.

Longfield, for the applicant:—

There is no direct authority; but it is submitted, from the definition of land in the Settled Land Act, 1882, that capital moneys can be invested in the purchase of shooting and sporting rights. Land includes incorporeal hereditaments: sect. 2, sub-s. 10. Sect. 21 provides how capital money may be invested. Under sub-s. (vii) it may be invested in the purchase of land in fee-simple; therefore, it may be invested in the purchase of

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In re PORTARLINGTON'S ESTATES.

an incorporeal hereditament, which it is submitted this right of shooting and sporting is. [O'Connor M.R.:—Would not sub-s. (viii) apply here, "in purchase of any easement, right, or privilege convenient to be held with the settled land for mining or other purposes"?] I prefer to rely on sub-s. (vii). "Other purposes" might mean ejusdem generis with mining purposes. There is no decision under sub-s. (viii).

The grant to a person, his heirs, and assigns of free liberty, with servants or otherwise, to come into and upon lands, and there to hawk, fish, or fowl, is a grant of a licence of profit, and not a mere personal licence of pleasure, and such a liberty is, therefore, a profit à prendre within the Prescription Act: *Wickham* v. *Hawker* (1).

In *Hooper* v. *Clark* (2) C. granted and demised the exclusive right and licence to take and kill game on certain land, with the use of a cottage, to the defendant for a term, and the defendant covenanted to leave the land at the end of the term as well stocked with game as at the time of the demise. C. assigned his reversion in the land and hereditaments to the plaintiffs, and they brought an action at the end of the term against the defendant for a breach of his covenant. It was held by Cockburn C.J. and Blackburn J. that the demise was not a mere licence, but the grant of an incorporeal hereditament, and that the plaintiffs could sue upon the covenant. Cockburn C.J. there says: "There is a demise of an incorporeal hereditament"; and Blackburn J.: "The right granted to the defendant is to shoot, kill, and take game, which is the creation of an incorporeal hereditament." In *Webber* v. *Lee* (3) it was held that a right to shoot over land, and to take away a part of the game killed, is a grant of an interest in land, and within the Statute of Frauds. Jessel M.R. there says: "The right to shoot game, and to take it away when shot, has been decided to be an interest in land, and a profit à prendre." In *In re Sir J. Rivett-Carnac's Will* (4) it was held by Chitty J. that a dignity or title of honour—a baronetcy in that case—was an incorporeal hereditament, and "land" within the meaning of sect. 37 of the Settled Land Act, 1882, and that a service of plate,

(1) 7 M. & W. 63.
(2) L. R. 2 Q. B. 200.
(3) 9 Q. B. D. 315.
(4) 30 Ch. D. 136.

which was to be enjoyed with the baronetcy, could be sold. In *In re Bective Estate* (1) it was held that a perpetual rentcharge was an incorporeal hereditament.

Sect. 22, sub-s. 2, provides that the investment is to be made according to the direction of the tenant for life, and sect. 42 affords the trustees ample protection in the case of purchase of land with capital money.

Brunskill K.C., for the trustees:—

In re Hunt's Settled Estates (2) shows that the trustees are not bound in every case to act on the direction of the tenant for life. Farwell J. there says: "A tenant for life is in the same position as a trustee, and is not justified in accepting a security which is not suitable."

The trustees do not wish to take up a hostile attitude, but they do not like the proposal to invest capital moneys in the purchase of sporting rights. There is no reported case in which trust-money was ever invested in a profit à prendre. Lord Portarlington rented these sporting rights before the Land Purchase Acts, and when he entered into the agreement to purchase them before he put the estate in settlement he was absolute owner thereof, and the agreement now sought to be carried out was not made by him as tenant for life. A right of sporting is an incorporeal hereditament, a profit à prendre. The words of sub-sect. (vii) are, "in purchase of land in fee simple." According to the statement of the law in XI Halsbury, p. 340, a profit à prendre may be created for an estate in perpetuity analogous to an estate in fee simple; a purchase of a profit à prendre is not a purchase of land in fee simple within sub-sect. (vii).

Sub-sect. (viii) has been pointed out by the Court; but the primary purpose of that sub-section is mining, and it was thought that the words "other purposes" referred to matters ejusdem generis.

O'CONNOR M.R.:—

In my opinion, this is a proper application of the capital money. I need not decide the nice question whether the right of

(1) 27 L. R. Ir. 364. (2) [1905] 2 Ch. 418.

M. R. 1918.

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shooting is an incorporeal hereditament which could be purchased under sub-sect. (vii); it is clearly a "privilege" which comes within sub-sect. (viii).

Solicitors for the appellant: *Moore, Keily, & Lloyd.*
Solicitor for the trustee: *H. D. Draper.*

W. L.

M. R. 1918.

March 10.
May 17.

HEALY, DECEASED.
HEALY *v.* OLIVER.
(1917. No. 340.)

Administration—Executor—Assets of testator—Power of executor to carry on business—Executor's right to indemnity—Right of receiver appointed by the Court to indemnity—Rights of creditors of executors and creditors of receiver—Priority.

The business of a testator was carried on pursuant to a direction in his will through the agency of his widow, and subsequently by a receiver appointed by the Court in an action to administer his estate. Debts were incurred by the executors and by the receiver in the carrying on of the business, and the assets realized were deficient.

Held, that the receiver was entitled to indemnity out of the assets against the debts incurred by him in priority to the executors, and that the creditors of the receiver had, by subrogation to his rights, priority over the creditors of the executors.

SUMMONS.

This was an application on the part of the plaintiff, Denis Healy, the executor of Mr. John P. Healy, late of Sallins, in the county of Kildare, merchant, deceased, for an order determining the rights of the creditors of the deceased and of the creditors of the trading carried on by the executors of the deceased, under their direction, by Mary Healy, his widow, pursuant to the directions contained in his will, and also determining the rights of the creditors of the trading carried on by Thomas Healy the receiver appointed in the matter.

M. R. 1918.

HEALY v. OLIVER

The following statement of the facts is taken from the judgment:—

The testator at his death was carrying on the business of a general merchant in the town or village of Sallins. He owed trade debts which have been found to amount to £310 11*s.* He authorized his executors to carry on the trading which they did through the agency of his widow, and during such trading debts were incurred which amount to £3920 12*s.* 7*d.* During the progress of the suit it became necessary to have a receiver and manager over the business appointed by the Court. The business was carried on by him until it was wound up, and the business and all the assets belonging thereto were realized. The receiver incurred debts to the amount of £397 7*s.* 8*d.* The assets of the testator are not sufficient for payment of the several classes of creditors, and the question is open in what priorities they should be paid.

Cecil Fforde, for the plaintiff and for the creditors of the testator.

Andrews K.C., for the creditors of the widow.

Hugh Kennedy, for the receiver.

The following authorities were referred to:—*Re Brooke* (1); *Kirkwood* v. *Hamilton* (2); *Moore* v. *M'Glynn* (3); *Dowse* v. *Gorton* (4); *Re Oxley* (5); *O'Neill* v. *M'Grorty* (6).*

O'CONNOR M.R. reserved judgment.

May 17.

O'CONNOR M.R.:—

This case has stood over from last sittings for decision on a question of priority between the right of the creditors of an executor carrying on the business of a testator and those of a receiver and manager subsequently appointed by the Court to carry on the same business with a view to its realization. I had myself no doubt as to the legal principles which governed the case and their application to it; but as the matter was of general importance, I thought it right to reserve my decision.

(1) [1894] 2 Ch. 600.
(2) 36 I. L. T. R. 155.
(3) [1904] 1 I. R. 334.
(4) [1891] A. C. 190.
(5) [1914] 1 Ch. 604.
(6) [1915] 1 I. R. 1.

* See also *Ramsay* v. *Simpson*, [1899] 1 I. R. 69.—ED.

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[Having stated the facts as above, His Honor proceeded as follows:—] Although the question is treated as one between creditors, it is, strictly speaking, one between the creditors whose debts became owing by the deceased in his lifetime, the executors, and the receiver, because the debts incurred by the two latter are their debts, and their respective creditors have claims against the assets only by a process of subrogation, by which they are entitled to stand in the shoes of the executors and receiver respectively, who are entitled to be indemnified out of the assets against the liabilities which they incurred.

Counsel for the creditors of the deceased felt himself obliged to admit that their claims should be postponed to those of the creditors of the executors and the receiver, because they consented to the trading which was carried on after the testator's death. This narrows down the question of priority to a contest between the creditors of the executors and those of the receiver—in other words, between the right of the executors and that of the receiver and manager to be indemnified.

Executors lawfully carrying on a testator's business are, no doubt, entitled as against every person claiming under his will to an indemnity out of his assets. So also is a receiver and manager appointed by the Court entitled to be indemnified. When the assets are insufficient to cover both indemnities, which is entitled to priority? I have no doubt that it is the receiver and manager. He is the officer of the Court charged with the management of the business for the purpose of realizing it to the best advantage of all the parties having an interest in the assets. Without his assistance the estate could not be satisfactorily wound up. His aid is requisitioned to save the estate, or so much of it as can be saved. He is really a salvagor, paying his money, or what is equivalent thereto, incurring personal liability, to save the estate for all parties, not merely the testator's creditors, not merely his legatees, but also the executors, who are entitled to be indemnified. He comes in as a kind of ultimate salvagor, incurring a risk for every other person; and it seems to be nothing more than the commonest equity to indemnify him before any person else is indemnified. He stands somewhat in the same position as an

(1) 11 I. E. R. 35.

incumbrancer making a payment which saves mortgaged property for every person. He has what in this country is called a salvage claim upon it, which takes priority of every other claim; and if there are several payments by several parties the last payment, as that which ultimately saved the property, gets priority. In fact the priorities are in the inverse order of the dates of payment. Such has been the practice of the Court of Chancery. See the judgment of Master Brooke, acting as Commissioner of the Great Seal, in *Fetherstone* v. *Mitchell* (1), and his observations (at page 43) on *Hill* v. *Brown* (1). The receiver in the present case has been in fact the ultimate salvagor, and so gets priority for his indemnity. Moreover, he is the officer of the Court, and entitled to special protection.

For these reasons I am of opinion that the creditors of receiver are by the process of subrogation entitled. So far I have not referred to any authority directly bearing on the rights of a receiver, nor do I think that authorities are necessary, because the case seems to me to be governed by first principles. But I may refer to *Batten* v. *Wedgewood Coal & Iron Co., Ltd.* (2). That was the case of a debenture holder's action brought against a company and the trustees of the deed securing the debentures to realize the debentures. A receiver was appointed by the Court, and when the security was realized it was found that the fund was insufficient for the payment of all claims against it. A question of priority of payment there arose between 1, the plaintiff's costs; 2, balance due to the receiver, including his remuneration and his costs; 3, the costs, charges, and expenses of the trustee; and 4, the amounts due on the debentures. The plaintiffs asserted the right to priority for costs, because it was by their action the property was realized, and a special case was made for such part of their costs as were costs of realization. The trustees claimed priority for their costs, charges, and expenses, on the ground that trustees are entitled to be indemnified against expenses before their cestuis que trust get anything. The action was tried by Pearson J., who commenced his judgment by saying:—"I have been exceedingly surprised at some of the arguments that have been addressed to me, and also to find that there is so very

(1) 6 I. E. R. 403. (2) 28 Ch. Div. 317.

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little authority directly in point. To my mind, however, that arises from the fact that the principles on which the Court is in the habit of acting have never been challenged, and that the rule has always been to pay the receiver before distributing the estate." At p. 324 he says: "Ought the receiver to be paid before it can be said that there is anything to distribute in payment of costs or anything else? In my opinion that is the receiver's position. He is the officer of the Court, and the Court is bound to see that he is paid, just as if the trustees had employed a manager, they would have been bound to pay him without regard to the sufficiency of the estate to meet the claims upon it. I think that the Court is bound to see that the receiver is paid." Later on he says: "I am of opinion, therefore, that the receiver in the present case must be indemnified, so far as the assets under the control of the Court enable this to be done." Then having stated that the costs of realization stand in a special position, the learned Judge fixed the following order of priority:—1, the costs of the realization of the property; 2, the balance due to the receiver; 3, the costs, charges, and expenses of the trustees; 4, the costs of the plaintiffs; and 5, the debenture holders.

I think that this case, decided on the general principles I have mentioned, is an authority in point for deciding that the receiver in the present matter has priority for his right to be indemnified against the debts incurred by him. This by the process of subrogation gives his creditors the priority which he has over the executors. This, I understand, is the only question remaining for decision. I wish to say, lest any question should afterwards arise as to personal liability for the debts incurred before the receiver and manager was appointed, that I have spoken of these debts as the debts of the executors, only because no distinction was made between the executors and the testator's widow, who actually carried on the trading.

For the purposes of the argument the trading was treated as that of the executors, and my judgment is on this basis, but I by no means decide as between them and the widow, who is personally liable to the creditors.

Solicitors for the plaintiffs: *Brown & M'Cann.*

Solicitors for the creditors of the widow: *Weaver & Fulton.*

Solicitor for the receiver: *T. C. Ross.*

W. L.

ATTORNEY-GENERAL FOR IRELAND (ON BEHALF OF HIS MAJESTY), APPELLANT; AND THE CORPORATION OF DUBLIN AND THE DUBLIN COUNTY COUNCIL, RESPONDENTS (1).

H. L. 1918. March 11, 12, 26.

Dublin Police District—Police Rate—Apportionment between county borough and outside area—Local Government (Ireland) Act, 1898 (61 & 62 *Vict. c.* 37), *sect.* 65, *sub-s.* 2; *sect.* 66.

Under the Dublin Police Acts, as amended by the Local Government (Ireland) Act, 1898, sect. 66, sub-ss. 2 and 4, the Commissioner of Police is entitled to raise for the maintenance of the police force an amount not exceeding eightpence in the pound on the annual value of the rateable hereditaments in the police district, which is apportionable between the city of Dublin and the rest of the district according to rateable value.

Sect. 65, sub-s. 2, of the Local Government (Ireland) Act, 1898, provides that, where part of a union is within and part without any county borough, a revaluation whereof has been made under sub-s. 1 of that section, the total amount to be raised for union charges shall be apportioned between each such part in proportion to the rateable value of each part "at the date when the revaluation under this section came into force." This enactment is by the sub-section applied to the said police district as if it were a union.

Pursuant to sect. 65, sub-s. 1, of the Act of 1898, a revaluation of the county borough of Dublin was made by which the total valuation of the rateable hereditaments in the borough was largely increased. This revaluation came into force on April 1, 1916.

Held, that the provisions of sect. 65, sub-s. 2, as to apportionment apply to the Dublin Police District in respect of police rate; but *held*, reversing the decision of the Court of Appeal ([1917] 1 I. R. 423), which had affirmed the judgment of O'Connor M. R. (ib., p. 40), that the Commissioner of Police in estimating and apportioning the amount necessary for the maintenance of the police force is bound to have regard to the valuation of the city of Dublin as it existed at and immediately after the date when the last previous general revaluation of the city under section 65 of the Act of 1898 came into force, subject to the cases mentioned in the proviso to sub-section 2 of that section.

Belfast Guardians v. *Belfast Corporation* ([1910] 2 I. R. 534), and *Rex* (*Belfast Corporation*) v. *Belfast Poor Law Guardians* ([1917] 2 I. R. 443 *n*), overruled.

(1) Before LORD FINLAY C., and LORDS ATKINSON, SHAW OF DUNFERMLINE, PARKER, and WRENBURY.

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APPEAL by the Attorney-General, on behalf of His Majesty, from an order of the Court of Appeal (1), dated the 5th June, 1917, affirming the judgment of the Master of the Rolls, which declared that the Commissioner of Police in Dublin metropolis, in estimating and apportioning the amount necessary for the maintenance of the police force and for the several purposes of the Dublin Metropolitan Police Acts, under sects. 65 and 66 of the Local Government (Ireland) Act, 1898, was and is bound to have regard to the valuation of the city of Dublin as it existed immediately prior to the date when the last previous revaluation of the city under sect. 65 of the said Act came into force.

Serjeant Sullivan and *Pigot K.C.* (with them *St. L. E. Devitt*), for the appellant.

Clancy K.C. and *Carrigan K.C.* (with them *P. A. O'C. White*) for the respondents, the Dublin Corporation.

S. L. Brown K.C. and *T. Sullivan K.C.* (with them *W. G. Shannon*), for the respondents, the Dublin County Council.

THE LORD CHANCELLOR (2) :—

My Lords, this appeal raises an important question as to the amount of the contribution to be made by the Dublin police district for the maintenance of the police therein, and its apportionment between the city of Dublin on the one hand and the adjoining portions of the county on the other, which together make up the district.

The force was constituted under the statute 6 & 7 Will. 4, c. 29, and provision was made for their maintenance out of the rates by the fourth section of the 7 Will. 4 and 1 Viet. c. 25. The whole of the latter section has been repealed, with the exception of the provision that the sums to be raised for the purpose shall not exceed in the whole in any one year 8*d.* in the £ on the annual value of the houses, lands, and tenements in the district, which provision is still in force. The Act of 1849, 12 & 13 Viet. c. 91, by sect. 30 provided that the justices of the peace for the districts

(1) SIR I. O'BRIEN, Bart., C., MOLONY L.J. (ROSAN L.J. dissenting). Reported [1917] 1 I. R. 401, 423.

(2) The report of the judgment in the House of Lords has been printed from the shorthand notes of Messrs. W. B. Gurney & Son.

should annually estimate the amount required for the police in the district, and transmit their certificate to the Collector-General (the official to whom the collection of rates was at that time entrusted), who should applot, levy, and collect the amount, the limitation to 8*d.* in the £ being preserved. By sect 44 of the same Act, which is still in force, it was provided that any such rate should be levied upon buildings and lands equably according to the net annual value thereof "as the same now are or shall from time to time be hereafter valued and rated" for poor law purposes.

The rates were collected under these and other enactments for many years without any friction. The difficulty which has given rise to the present litigation was occasioned by the terms of the Local Government (Ireland) Act, 1898, sects. 65 and 66. These sections, so far as material, are in the following terms:—

Sect. 65, sub-s. 1: "A general revaluation of rateable hereditaments under the Valuation Acts may be made, as respects a county borough, on the application of the council, and the council so applying shall pay such portion, not exceeding one-half, of the cost of the revaluation as the Treasury direct, and upon any such general revaluation the land in the borough shall be valued in the manner directed by sect. 11 of the Valuation (Ireland) Act, 1852, with respect to houses and buildings. Sub-s. 2. Where part of a union is within and part without any county borough in respect of which a revaluation is made under this section, the total amount to be raised for union charges in that union shall be apportioned between each such part of the union in proportion to the rateable value of each part at the date when the revaluation under this section came into force. Provided that after the expiration of five years from that date, if no general revision has meantime been made, the Commissioner of Valuation, if satisfied by the council of the borough or the guardians representing the electoral divisions of the union situated outside the borough, or a majority of them, that the apportionment has become inequitable by reason of subsequent changes in the value of any hereditaments in the union, may revise the proportion in which the union charges are to be apportioned. This enactment shall apply to the police district of Dublin metropolis and to the Dublin bridge area within the meaning of the Dublin Port and Docks Board and Bridges Act, 1876, as if it were a union, but with the substitution of the county council of the county of Dublin, with respect to the revision of the apportionment for the said guardians."

Sect. 66, sub-s. 2. "The Commissioner of Police of Dublin Metropolis under the Dublin Metropolis Police Acts shall, at the prescribed time before the beginning of every local financial year, estimate the amount of money which he finds necessary for the maintenance of the police force, and for the several purposes of the said Acts during that year, not exceeding the amount which the

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Commissioner is, under the said Acts, or any of them, entitled to raise by a rate thereunder. Sub-s. 3. The Dublin Port and Docks Board shall at the prescribed time before the beginning of every local financial year estimate the amount of money which they require to be raised in that year for the purpose of the bridge tax (if any) and bridge rate respectively. Sub-s. 4. The Commissioner and Board respectively shall apportion each amount so estimated between the city of Dublin and the rest of the police district of Dublin metropolis or of the bridge area (as the case may be) which is outside the city of Dublin, and shall so apportion according to rateable value; and shall send to the council for the city of Dublin a demand for the amount apportioned to that city and to the council of the county of Dublin a demand for the amount apportioned to the rest of the police district or bridge area; and each council shall pay by equal half-yearly payments the amount specified in such demand less 5 per cent., as and for the cost of collection and irrecoverable rates and office expenses, and also such less sum (if any) as the Local Government Board certify in each half year to be the proportion of the Collector-General's annuity hereinafter mentioned properly chargeable against any such payment. Sub-s. 5. The council of the city of Dublin shall raise, either by means of a separate rate or by means of the poor rate, but as a separate item thereof, a sum equal to the amounts specified in such demand, but the demand note shall specify approximately the amount in the pound required for each amount."

The Dublin Corporation made application under sect. 65, sub-s. 1, of the Local Government Act for a revaluation. That revaluation was made with the result that the valuation of the city of Dublin was largely increased. It may be observed that such an increase has invariably followed revaluation under sect. 65, sub-s. 1, owing to the direction at the end of that sub-section that upon any such general revaluation the land in the borough shall be valued as directed by sect. 11 of the Valuation (Ireland) Act, 1852, with respect to houses and buildings. This revaluation came into force on the 1st April, 1916.

On the 7th March, 1917, the Chief Commissioner of Police served on the respondents an estimate of the amount of police tax required for the financial year, 1st April, 1917, to 31st March, 1918. The amount required was £54,956 15*s.* 4*d.*, of which £37,388 2*s.* 10*d.* was apportioned as payable by the Corporation and £17,568 12*s.* 6*d.* as payable by the County Council. The estimate was based at 8*d.* in the £ on the valuation of the whole police district as increased by the revaluation of the city, and was apportioned on the same basis less 5 per cent. for costs of collection, &c. The

total amount required for police service has for many years largely exceeded the amount yielded by an 8*d.* rate on the valuation of the police district, and the deficit falls to be made good by the Exchequer.

The Corporation insisted that the estimate of the Commissioner was erroneous; that he was not entitled to an amount equal to 8*d.* in the £ on the value of the police district as increased by the revaluation of the city, and that the police rate must be estimated on the valuation of the police district of Dublin city and county, as it existed immediately before the general revaluation of the city came into operation. In consequence of this contention by the Corporation the Attorney-General for Ireland instituted the present action against the Corporation of the City of Dublin and the County Council of the County of Dublin to obtain a declaration, first, that the Commissioner of Police is entitled to have raised towards the maintenance of the police within the Dublin police district the amount of a rate of 8*d.* in the £ on the annual value of the lands and tenements in the police district; second, that the amount to be raised by the same rate should be calculated on the increased valuation of the police district caused by the revaluation of the city of Dublin; and third, that the amount of the rate should be apportioned between the city of Dublin and the portion of the police district outside the city in proportion to the rateable value of each at the time immediately after the revaluation of the city of Dublin came into force. There were also other claims in the alternative.

Defences were put in by the Corporation and by the County Council. The Corporation pleaded that the rate should be calculated on the valuation of the district immediately prior to the date when the revaluation of the city came into force; that this basis should apply to the apportionment between the city and the portion of the district outside the city, and that the rate could not exceed 8*d.* in the £. The Dublin County Council pleaded that the rate could not exceed 8*d.* in the £, and should be levied equally over the whole district, and that if it should be held that the amount recoverable should be calculated on the rateable value of the police district after the revaluation of the city, no part of the increase of cost should fall on the portion of the police district in

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the county, and in the alternative that the amount should be apportioned between the two portions of the district in proportion to the rateable value of each immediately after the revaluation of the city came into operation.

The Master of the Rolls adopted the contention of the Corporation, and by his order, dated 28th March, 1917, declared that the Commissioner of Police in estimating and apportioning the amount necessary for the maintenance of the police under sects. 65 and 66 of the Local Government Act, was bound to have regard to the valuation of the city as it existed immediately prior to the date (1st April, 1916) when the revaluation came into force. This order was affirmed by the Court of Appeal, Lord Justice Ronan dissenting, and the present appeal to this house asks that it should be reversed.

In 1910 it had been decided in the case of the *Belfast Poor Law Guardians* (1) by the Court of Appeal in Ireland, following the opinion of Chief Baron Palles (2), that under sect. 65, sub-s. 2, the apportionment in the case of a union which comprised a county borough and portions of adjacent counties is to be made in proportion to the rateable value of each part of the union in the valuation of the county borough in force immediately before the revaluation and on the valuation of the respective county portions then in force. This authority was followed, and was in terms approved by both courts in the present case. They further held that in terms of the last sentence of sect. 65, sub-s. 2, the decision in the *Belfast Case* (1) as to a union was applicable to the Dublin police rate.

The case turns entirely upon the meaning which is to be given to the words occurring in sect. 65, sub-s. 2, "in proportion to the rateable value of each part at the date when the revaluation under this section came into force." This is the criterion prescribed for apportionment in cases in which part of the union is within and part without a county borough. The natural meaning of these words appears to me to be that for this purpose the rateable value is to be taken at the moment when the revaluation comes into force, that is, that it is to be according to the rateable value when the revaluation begins to operate. It does violence to these words

(1) [1910] 2 I. R. 534. (2) Reported [1917] 1 I. R. 443 *n.*

to read them as meaning that you are to take as a basis the rateable value before the revaluation came into force. If this had been meant, the Legislature would have said not "at" but "before." My view of this point is confirmed by the terms of the rest of the sub-section. It is impossible to read this clause as stereotyping for ever the standard for apportionment. In the case of a second revaluation it is obvious that a new apportionment would have to be made. This results from the initial words of the sub-section, and the terms of the proviso recognize that in the case of a subsequent general revision there would be a fresh apportionment. The result of reading "at" as meaning "before" would be somewhat whimsical. On each fresh revaluation there would be a new apportionment, but that would be according to the rateable value in force immediately before the fresh revaluation took effect; in other words, the fresh apportionment would be based on the rateable value as shown by the first revaluation. In my opinion the meaning of the statute plainly is that where there has been revaluation the apportionment is to proceed on the basis of that revaluation.

I am, therefore, unable to agree with the decisions on this point in the *Belfast Case* (1), and in the present case. Some weight was given, especially when the point was considered by Chief Baron Palles, to the consideration that a revaluation in a county borough was to be made on the application of the council, and that it would not be right that if the revaluation resulted in a reduction in the rateable value of the borough, they should benefit as between themselves and the county council by a reduction which they themselves had brought about by procuring a revaluation. As I have already pointed out, any reduction on a revaluation in the county borough is extremely improbable, owing to the provision that land in boroughs is to be valued on a revaluation at site value. The theoretical possibility that such a reduction might take place should not, I think, have any weight in determining the construction of the section.

I think that the Courts below were right in holding that the provision of sect. 65, sub-s. 2, as to apportionment, applied to the Dublin police district in respect of the police rate. I cannot agree

(1) [1910] 2 I. R. 534.

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with the ingenious train of reasoning which enabled Lord Justice Ronan, while agreeing with the other members of the Court as to the meaning of the words, "at the date when the revaluation under this section came into force," to escape from their conclusion that the effect of these words was to increase the share of the cost of maintenance of the police to be borne by the Exchequer; but I agree with his conclusion, although for different reasons.

The construction of sect. 66 presents no difficulty. It prescribes by sub-sect. 4 that the apportionment is to be according to the rateable value, and the natural meaning of these words is that the rateable value of the county borough should be taken according to the valuation in force when the apportionment falls to be made.

I am therefore of opinion that the appeal should be allowed, with costs, here and below as against the Dublin Corporation. There will be a declaration that the Commissioner of Police, in estimating and apportioning the amount which he finds necessary for the maintenance of the police force and for the several purposes of the Dublin Metropolis Police Acts, under sect. 65 and sect. 66, sub-s. 2, of the Local Government (Ireland) Act, 1898, was and is bound to have regard to the valuation of the City of Dublin as it existed at and immediately after the date when the last previous general revaluation of the city, under sect. 65 of the said Act, came into force, subject to the cases mentioned in the proviso to sub-sect. 2 of sect. 65.

LORD ATKINSON:—

My Lords, I concur.

The principal question for decision on this appeal is in substance a narrow one. It is in reality the proper construction of three words contained in sect. 65, sub-s. 2, of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37). These words are, "came into force." By sub-sect. 1 of that section, county boroughs, of which the county of the city of Dublin is one, were empowered to have made, on the application of their respective councils, a general revaluation under the Valuation Acts of all rateable hereditaments respectively contained within them, upon which revaluation the land within each borough was to be valued as directed by sect. 11 of the Valuation (Ireland) Act of 1852 (15 &

16 Vict. c. 63). By sub-sect. 3 of the same section the expression "general valuation" is defined to mean a general revision under sect. 34 of this same statute of 1852. By sect. 11 of this last-named statute it was provided that the valuation of houses and buildings should be made upon an estimate of the net annual value thereof, that is to say, the rent for which one year with another the house or building might, in its actual state, be reasonably expected to be let from year to year, the probable average cost of repairs, insurance, and other expenses (if any) necessary to maintain it (the hereditament) in its actual state, rates, taxes or public charges, if any (except tithe-rent charge), being paid by the tenant. The principle upon which under this same section land was to be valued was wholly different. The valuation of land was to be made upon an estimate of its net annual value with reference to the average prices of the several articles of agricultural produce thereinafter specified, all peculiar local circumstances being taken into consideration in each case, and all rates, taxes, and other charges (except tithe-rent charge) being paid by the tenant. These prices have, in process of time, much altered. The general valuation dealt with by this Act was carried out by Sir Richard Griffith and his staff, and is commonly known in Ireland by the name of Griffith's valuation. It is, I think, generally recognized in Ireland to have been a fair and accurate valuation at the time it was made; but it is obvious that, as the prices specified for the different agricultural products named varied from the prescribed standard, it tended to become inaccurate, and, besides, the method of valuation of land was wholly inapplicable to the valuation of plots of land lying within county boroughs and suitable for building sites. One of the advantages, therefore, which a county borough would derive from having a general revaluation made under sect. 65, sub-s. 1, for which its council would only have to pay at most half the cost, was, that the land within its confines would no longer be valued as agricultural lands, but upon its estimated letting value to a hypothetical tenant, having regard to all its capacities.

The Council of the County Borough of Dublin, acting under the powers conferred by this 65th section, procured a general revaluation to be made of all the rateable hereditaments within

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the borough. It was completed in April, 1916. By it the valuation of the entire borough was considerably enhanced. Having regard to the new method adopted for the valuation of land, and to the fact that there had not been any general revision of the valuation of 1852 for a period of sixty-four years, that result would seem to be one not unnatural in itself, and certainly one which the council must have contemplated, and properly desired to bring about. By sect. 109 of the Local Government (Ireland) Act of 1898 the expression "union" is defined to mean a poor law union, and the expression "rateable value," when used in relation to any hereditament or area, is defined to mean the annual rateable value under the Valuation Acts of such hereditaments, or of all the hereditaments comprised in the area. The above-mentioned statute of 1852 is one of these Valuation Acts.

By the 44th section of the Local Government (Ireland) Act, the old system of rating by electoral divisions for the relief of the poor was abolished, and union rating established. This was admitted in argument to be a great improvement, since, there being no law of settlement in Ireland, paupers frequently became under the former system chargeable to electoral divisions in which they had resided but for a very short time. The section provides that all expenses of the guardians of a union shall be raised equally over the whole union, and shall be called union charges. As by the earlier provisions of the Act the business of the poor law guardians as regards the making, levying, collecting, and recovering poor rate was transferred to, and vested in, the county authorities in each county, it became necessary on the coming of the Act into operation at once to deal with the case of a poor law union which extended into two or more counties, and, accordingly, by sect. 43, it was further provided that in such a case the total amount to be raised off the union should be apportioned between the parts lying in the two or more counties in proportion to their rateable value, and the amount so apportioned to a divided part should be raised equally over that part as if it were a separate union. This apportionment had nothing whatever to do with general revaluation. It took place years ago, and it is an entire mistake to suppose it has any application to the apportionment

taking place on a general revaluation made eighteen years after the passing of the Act.

As a uniform system of valuation existed all over Ireland under the aforesaid statute of 1852, and the Acts amending it, the word "equally" used in the above section must, I think, mean an equal poundage on the valuation on each taxable area. In the superseded system the poundage rates levied on the several electoral divisions often varied considerably. By sect. 6 of the Local Government Act of 1898 the business of the guardians with respect to levying, collecting, and recovering the poor rate in so much of the county as was not comprised in an urban county district was transferred to the county council, and by sect. 21 it was enacted that each of the boroughs mentioned in the second schedule to the Act shall be an administrative council of itself, and be called a county borough. The county of the city of Dublin is one of these boroughs, and, as an urban county district cannot exist within it, the before-mentioned business of the guardians was transferred to the council for the borough.

The second sub-section of sect. 65 provides for the apportionment, after the general revaluation has been made, of the total amount to be raised for union charges in any union, part of which is within and part without the county borough, and enacts that these charges shall be apportioned between each part of the union in proportion to the rateable value of each part at the date when the revaluation came into force. Admittedly that was a past event relatively to the apportionment, and the word "came" is properly used in the past tense. The new valuation came into force, and the old valuation was necessarily superseded, and became obsolete at the same moment.

The Irish Court of Appeal have decided that the rateable value of each portion of the union according to which these proportions are to be fixed is their rateable value according to the old, superseded, and presumably inaccurate, valuation, not the new revaluation, which had previously come into force, and by coming into force had necessitated the apportionment. I cannot bring myself to accept that view. The sub-section contemplates that the revaluation should (subject to a provision to be afterwards dealt with) last for at least five years. Well, if there were

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a revaluation in 1921 the proportion should be fixed, as I understood the argument, on the superseded and obsolete valuation of 1916; and, again, if there were a third valuation in 1926, the proportion should be fixed upon the valuation of 1921: thus the superseded, obsolete, and, if altered, discredited valuation is made the basis of each revaluation.

In addition, it certainly would appear to me that the provision dealing with the intervention of the Commissioner of Valuation in order to redress grievances, presupposes that in this matter of apportionment the revaluation has been the basis of the apportionment, and it is because it has not been superseded by a new revaluation within five years that he is to interpose to remedy an apportionment which has become inequitable by reason of changes in the value of the hereditaments valued, and, if need be, to revise the proportion on which the union charges are to be apportioned.

Why is the hand of the Commissioner stayed for five years? If the apportionment was to take place on the obsolete valuation of 1915 there is no reason whatever why it should be so stayed. It is stayed because the new valuation of 1916 is to be operative for five years. A further new valuation may then be made, and deal with these changes in the value of the hereditaments in the union. If it should not be made, then he can intervene, and revise the proportions in which the union charges are to be apportioned.

In my view, therefore, the words "rateable value of each part at the date when the revaluation came into force" mean the rateable value under the revaluation, and not under the superseded valuation, the words "at the date" being in effect construed as "at and after" that date, not "before and at" that date. I cannot appreciate the want of reason or justice said to be involved in so construing this sub-section while the outlying portions of a union continue to be rated under the Act of 1852.

Moreover, it was strongly urged that it would be a great injustice to apportion on the basis of the valuation of 1916 while the outlying portion of the union continues to be rated under the Act of 1852. If there be such force in that objection as is suggested, then, provided the valuation of the outlying portions

of the union should remain unchanged, the valuation upon which the apportionment should take place in 1921 and 1926 should as to those portions still be the old valuation of 1915, or if not, this objection must be disregarded, and this injustice done by apportioning in 1921 on the basis of the valuation of 1916. But this injustice, if it exists, like some others which were complained of, can only be redressed by a legislative body. The final provision of this sub-section enacts that the sub-section ("this enactment") shall apply to the police district of Dublin metropolis and to the Dublin bridge area within the meaning of the Dublin Port and Docks Board and Bridges Act of 1876, as if it were a union, but with the substitution of the council of the city of Dublin with respect to the revision of apportionment for the said guardians.

Sect. 65 of the Local Government Act is one of a group of seven sections headed with the description "general," and dealing with general matters touching local government. Sect. 66 is headed "Collection of Rates and Duties in Dublin." By sub-s. 10 the office of Collector-General of Rates is abolished; sub-s. 1 deals with the levying of poor rate; sub-s. 2 provides that the Commissioner of Police of Dublin metropolis under the Dublin Metropolis Police Acts shall, at the prescribed time, before the beginning of every local financial year, estimate the amount of money which he finds necessary for the maintenance of the police force not exceeding the amount which the Commissioner is under the said Acts entitled to raise by a rate thereunder. By the 7 Will. 4 and 1 Vict. c. 25 and subsequent statutes that amount was a rate of 8*d.* in the £ on the annual value of the houses, lands, and tenements within the district. Sub-s. 3 of sect. 66 of the Act of 1898 makes somewhat similar provision as to the bridge tax. Sub-s. 4 provides that the Commissioner and Board respectively shall apportion each amount so estimated between the city of Dublin and the rest of the police district of Dublin metropolis or of the bridge area (as the case may be) which is outside the city of Dublin, and shall so apportion according to rateable value; and shall send to the council for the city of Dublin a demand for the amount apportioned to that city, and to the council of the county of Dublin a demand for the amount apportioned to the rest of the police district or bridge area; and each council shall pay by equal

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half-yearly payment the amount specified in such demand less 5 per cent., as and for the cost of collection and irrecoverable rates and office expenses, and also less such sum (if any) as the Local Government Board certify in each half year to be the proportion of the Collector-General's annuity hereinafter mentioned properly chargeable against any such payment. Sub-s. 5 provides that the council of the city of Dublin shall raise, either by means of a separate rate or by means of the poor rate, but as a separate item thereof, a sum equal to the amounts specified in such demand, but the demand note shall specify approximately the amount in the pound required for each amount.

It is conceded that the poor rate and all rates and taxes in Ireland are assessed according to the valuation made under the Act of 1852. The Commissioner of Police is thus required to apportion the amount so estimated by him for the support of the police between the city of Dublin and the rest of the police district which is outside the city of Dublin according to rateable value. Surely that must be the rateable value at the time he makes the apportionment which during the five years succeeding the making of each general revaluation area meant the rateable value fixed by that revaluation. The Commissioner then sends to the councils for the city and county respectively a demand for the amount so apportioned upon each, which the councils become bound to pay, less 5 per cent., thus becoming debtors to the Crown for this amount.

The police district was created under an Irish statute (48 Geo. 3, c. 140), and the Metropolitan Police Force raised under the provisions of the 6 & 7 Will. 4, c. 29. It is not disputed that this district extends into the county of Dublin far beyond the city boundaries, nor is it disputed that the maximum rate which can be levied on the rateable hereditaments within the district is 8*d.* in the £. And it is admitted that the sum levied by such a rate on the old valuation under the Act of 1852 and the Acts amending it would before revaluation took place only produce a sum equal to about one-third of the cost of the maintenance of the force. The Treasury, it is not disputed, contributes the remaining two-thirds. No doubt, now that the valuation of the city has been considerably raised, it cannot be disputed but that the sum raised by an 8*d.* rate assessed on the revaluation would increase the

sum contributed by the city of Dublin towards the maintenance of the Metropolitan Police Force. Mr. Clancy complains that the sum levied on the city before revaluation was too much, and that to increase the burden would be most unjust.

My Lords, sitting as a judicial tribunal, this House has nothing to say to matters such as these. Our business is to construe the words of the several statutes brought before us as best we can, and to discover the intention of the Legislature from the language of the enactments passed by it, which is its language. It may be that Mr. Clancy's complaint is well founded. Upon that question I express no opinion. If the complaint be addressed to the Legislature, the proper tribunal, and shown to be just, presumably it will be redressed. On the question for our decision, I think, for the reasons that I have given, that the decision appealed from was erroneous and should be reversed, and this appeal should be allowed, with costs here and below. I concur with the Lord Chancellor in thinking that the case of the *Belfast Poor Law Guardians* (1) was wrongly decided; and I agree with the conclusion at which Lord Justice Ronan has arrived, which is, as I understand it, identical with that at which this House has arrived, although, for different reasons. I approve of the declaration mentioned by the Lord Chancellor.

LORD SHAW OF DUNFERMLINE:—

My Lords, in the judgment pronounced in this case by Lord Justice Ronan, there occur three propositions which I venture to adopt. "Subject," he says, "to this matter of apportionment, it is clear, prima facie—1, that the Crown is entitled to 8*d.* in the £ on the existing valuation; 2, that the only limitation of the liability of each portion of the district is 8*d.* in the £ on the valuation of the portion; 3, that neither portion is asked to pay more than 8*d.* in the £ on its valuation."

Thus far, my Lords, I agree; and I add a fourth proposition to which I understand all your Lordships assent—4, that the valuation upon which the apportionment is to proceed is the revaluation obtained under sect. 65, sub-s. 1, of the Act of 1898.

(1) [1910] 2 I. R. 534.

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Upon this, however, my Lords, considerable argument ensued, and the House heard a strenuous defence of the judgment of the Court below by Mr. Clancy and his learned junior.

My Lords, it is necessary that I should, even at the risk of repetition, call attention to the situation of valuation in Ireland under its statutes, and particularly to the two Acts of Parliament which are of importance. I refer, in the first place, to the nature of Griffith's valuation under the Act of 1852 (15 & 16 Vict. c. 63). By the 11th section of that statute it was enacted that tenements should be valued separately in an estimate of the annual value in reference to the prices of the following agricultural produce, namely—wheat, oats, barley, flax, butter, beef, mutton, and pork. That was a scheme of valuation very plainly applicable to agricultural land. In the same section it is, however, provided that valuation, in regard to houses and buildings, shall be made upon an estimate of the net annual value thereof, that is to say, the rent for which, one year with another, the same might in its actual state be reasonably expected to let from year to year.

My Lords, it is manifest that the application of the former part of that section to plots of land possibly, say, to back courts and the like, or small garden-plots in cities, or possibly to land whose whole value is in the site for building, was not approached in point of reality by a valuation obtained under the earlier portion of sect. 11 of the Act of 1852.

Accordingly, in 1898, there was passed the statute known as the Local Government (Ireland) Act, and by sect. 65 of that statute it was provided that a general revaluation of rateable hereditaments may be made as respects a county borough on the application of the council, and so forth; and then this specific provision was enacted: "And upon any such general revaluation, the land in the borough shall be valued in the manner directed by sect. 11 of the Valuation (Ireland) Act, 1852, with respect to houses and buildings."

It appears to me clear, my Lords, that here is a specific substitution in the direction of and for the purpose of achieving reality and the dissipation of fiction. It is manifest that the old system of agricultural valuation applicable to land in boroughs was considered unreal, fictitious, and inequitable, and therefore

there was the substitution by this statute of 1898 of a valuation based upon the principle of what the subject would let for, one year with another.

My Lords, this being the provision of sub-sect. 1 of sect. 65 of the Local Government (Ireland) Act, there is in sub-sect. 2 a clause which somewhat to my surprise has been the subject of litigation in Ireland—not this litigation merely—but former litigation. It is provided in the earlier portion of that sub-section that where part of a poor law union is within and part without a county borough in respect of which a revaluation is made under this section, the total amount to be raised for union charges shall be apportioned, and then follow these words: "between each such part of the union in proportion to the rateable value of each part at the date when the revaluation under this section came into force."

My Lords, it appears clear to my mind that the two operations are in successive order. There is first the revaluation which is to be obtained for achieving the reality to which I have alluded, for dissipating the fiction to which I have alluded, and for causing the inequitable nature of the valuation to disappear and a real figure of value to be entered instead of a fanciful figure upon the Valuation Roll.

My Lords, that revaluation has first to take place. A second and subsequent operation is the operation of apportionment. Apportionment comes after the revaluation, and in my opinion it seems—but for the judgments of the Courts below in the *Belfast Case*(1) and in the present case—almost beyond question to say that that apportionment should proceed upon the basis of the revaluation which has been made. It would be a strange result otherwise, my Lords, because it would mean this, that the reality obtained should be obtained in Ireland on a valuation for all purposes except apportionment, but for the purpose of apportionment unreality was to remain, and the whole system of apportionment was to proceed upon being five years postponed behind reality and remaining for that five years in a period of inequitable fiction.

(1) [1910] 2 I. R. 534.

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My Lords, I cannot understand how that result can be reached upon language so plain as this, that the apportionment is to proceed in proportion to the rateable value of each part at the date when the revaluation under this section came into force. At that date and from that date onwards everything is changed—everything is brought up to date. I think that included in that stands the operation of apportionment.

In my opinion the judgments of the Courts below should be reversed, the appeal should be allowed, and in its general terms I agree with the judgment proposed from the Woolsack.

LORD PARKER OF WADDINGTON (read by LORD WRENBURY):—

My Lords, I agree.

In order to provide for police expenses in the district of the Dublin Metropolis certain justices of the peace were appointed under the Act of 1 Viet. c. 25, with power (sect. 4) to levy on all houses, lands, and tenements within the district a rate not exceeding 8*d.* in the £. This rate was never in fact sufficient to cover the expenses in question, and the Treasury has always made up the deficiency. Under later Acts the Commissioner of Police took the place of the justices of the peace, and the actual collection of the rate was confined to an officer known as the Collector-General of Rates. The course then pursued was as follows:—The Commissioner of Police estimated the amount he required for police purposes in each financial year, and certified the amount so estimated to the Collector-General. The Collector-General then levied a rate not exceeding 8*d.* in the £ on all hereditaments within the district, according to their rateable value for the time being. After the passing of the Valuation (Ireland) Act, 1852, this rateable value was the rateable value for the time being, ascertained under that Act, and the Acts amending the same, for the purposes of the poor rate. It is to be observed, 1, that under the Valuation (Ireland) Act, 1852, and the amending Acts, the basis of valuation for houses and buildings is different from the basis of valuation for land, and, 2, that under these Acts, while provision is made for a general revision of rateable values once every fourteen years only, there is an annual adjustment whenever any special circumstance affecting a particular hereditament

has brought about a change in its value; e.g., when a house has been erected on a site theretofore valued as land only.

The Local Government (Ireland) Act, 1898, established certain county boroughs, including the county borough of Dublin. The boundaries of these boroughs were so defined as in some cases to include parts only of existing poor law unions. In like manner, the boundaries of the county borough of Dublin were so defined as to include only part of the Dublin metropolis police district. Further, the office of Collector-General was thereby abolished, and it became necessary to prescribe a new scheme for levying and raising the police rate. This was done by the 66th section. Under it the Commissioner of Police is, at the prescribed time, before the beginning of every local financial year, to estimate the amount he will require for police purposes during that year, but not exceeding the amount which, under the Dublin Metropolis Police Act, he is entitled to raise by a rate thereunder. He is then required to apportion the estimated amount between the city of Dublin and the rest of the police district which is outside the city, on the basis of rateable value, and to send to the council of the city a demand for the amount apportioned to that city, and to the council of the county of Dublin a demand for the amount apportioned to the rest of the police district, and each council is to pay to the Police Commissioner the amount specified in such demand, less 5 per cent. for the cost of collection, and irrecoverable rates, and office expenses. Then follow certain provisions enabling the council of the city and the county council to raise the amounts thus demanded of them as part of the poor rate, or by means of a separate rate to be levied on the same basis as the poor rate.

It is to be observed that under this scheme the individual ratepayer loses the benefit of the limitation of the police rate to 8*d.* in the £; but the ratepayers, collectively, in the respective parts of the district, within and without the county borough, retain the benefit of such limitation, because the estimate of the Police Commissioner cannot exceed 8*d.* in the £, and the apportionment he is to make must be on the basis of rateable value.

It appears to me that, apart from any difficulty created by the

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65th section of the Act, which I will consider presently, this scheme is quite clear. The Commissioner of Police calculates the amount of 8*d.* in the £ on the rateable value at the date of calculation of all hereditaments within the police district, and apportions the amount on the basis of rateable value between those parts of the district which are within and those which are without the county borough. He can recover as a debt from the city council and county council respectively the amounts so apportioned less certain prescribed deductions, and he has nothing to do with the manner in which the city and county respectively raise those amounts.

I pass now to the 65th section. It provides (sub-s. 1) that a general revaluation of rateable hereditaments under the Valuation Acts may be made as respects a county borough on the application of the council, and that upon any such revaluation the land in the borough shall be valued in the manner directed by sect. 11 of the Valuation (Ireland) Act, 1852, with respect to houses and buildings. A general revaluation is defined by sub-s. 3 to mean a general revision under sect. 34 of the Act of 1852; but whereas, upon a revision under this 34th section, land would have been valued on a basis differing from the basis applicable to houses and buildings, the latter basis is for the purpose of a general revaluation of a county borough made applicable to land also.

The 2nd sub-section of sect. 65 provides that where part of a union is within and part without any county borough in respect of which a revaluation is made under this section, the total amount to be raised for union charges in that union shall be apportioned between each such part of the union in proportion to the rateable value of each part at the date when the revaluation under the section came into force. Clearly the apportionment to which the sub-section refers will take place after the revaluation; and the effect of the sub-section is that the person making the apportionment is to disregard the rateable value existing at the time when the apportionment is made, and in its stead, to have regard to the rateable value which existed at a point of time in the past, all changes in value since that point of time being ignored. This is made additionally clear by the proviso which immediately follows. It may be that apportionment with reference to the rateable value at the date when the revaluation came into force may become

inequitable by reason of subsequent changes in the value of hereditaments within the union. In such a case, after the expiration of five years from the date when the revaluation came into force, if no general revision has meantime been made, the Commissioner of Valuation may revise the proportion in which the union charges are to be apportioned under the sub-section.

The only difficulty in construing the sub-section is to ascertain what is meant by "the rateable value of each part at the date when the revaluation under this sub-section came into force." It is said that the words "at the date when," etc., are ambiguous. They may mean "before and at" the date in question, or "at and after" the date in question. In the former case the rateable value of the part of the union within the borough would be very different from its rateable value in the latter case. I cannot myself see that there is any real ambiguity. The person making the apportionment has to carry his mind back to the date at which the revaluation came into force. In so doing he must, it is true, carry his mind back to the earliest moment when the revaluation was in force, but he need not and ought not to carry his mind back to any earlier point of time. If he does so he will arrive at a point of time at which the revaluation had not come into force, and thus act contrary to the express words of the section.

I am confirmed in this conclusion by the curious results which would follow if the contrary contention prevailed. Thus in the present case the revaluation of the county borough would, for the purpose of raising union charges, have to be ignored until a second revaluation took place under the section. When a second revaluation took place, it, in its turn, would have to be ignored, but the moment it took place the first revaluation, perhaps many years out of date, would become the basis of apportionment. It is impossible to assign any intelligible reason for such a result, and such a result is quite inconsistent with the reason put forward to justify the contention with regard to the first revaluation—namely, that no revaluation under the section should increase or diminish the amount to be raised for police purposes or the incidence of the police rate. In my opinion the *Belfast Case* (1) was wrongly decided.

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It remains to consider how sect. 65, s.-sect. 2, so construed, affects the police rate. I cannot doubt that by its concluding words the sub-section is made applicable to the Police District of Dublin Metropolis as if it were a union. This must, if it is to have any effect at all, make the expenses of the Commissioner of Police apportionable between that part of the district which is within the county borough and that portion of the district which is without the county borough in the manner provided for the apportionment of union charges. It seems to me that the apportionment to be made by the Police Commissioner under the 66th section must be made in this manner. The 66th section provides that it shall be made on the basis of rateable value, but it does not specify the date at which such rateable value is to be ascertained. The omission is supplied by the 65th section. I do not think, however, that the 65th section has any bearing on the estimate which the Commissioner is to make under the 66th section. His estimate is to be an estimate of the actual sum required for the ensuing financial year, not exceeding the amount which he is, under the Dublin Metropolis Police Acts or any of them, entitled to raise by a rate thereunder. This amount falls to be determined by taking 8*d.* in the pound on the poor law valuation in force for the time being. In apportioning the estimated amount he is, however, precluded by the 65th section from taking into account any changes in value since the revaluation thereunder. For five years, at any rate from the date of any revaluation, the basis of apportionment remains the same, though the amount to be apportioned may vary. It is argued that this is an absurd result, but I am unable to see any absurdity in it. The scheme is to ascertain a sum and then apportion it. The sum to be ascertained is not to exceed a certain maximum, which is settled by the Dublin Metropolis Police Acts. The apportionment is rendered necessary by and carried out under the Local Government Act. I cannot see why the provision for apportionment under the latter Act should impliedly vary the mode in which under the former Acts the maximum is to be ascertained.

In my opinion the appeal succeeds, and the orders below should be discharged with costs here and below.

LORD WRENBURY:—

My Lords, I agree that this appeal succeeds. The construction which your Lordships place upon the Act of 1898 is much strengthened in my judgment by the proviso in sect. 65, sub-s. 2, of that Act. The effect of that proviso is that for five years matters are to remain undisturbed. After the expiration of five years, if the apportionment "has become inequitable," it may be revised. This assumes that the apportionment at the date when it was made will have been equitable. An equitable apportionment at the date of the valuation must be an apportionment upon the footing of the rateable values at that date. To take a rateable value which by the revaluation has been shown to be at that time erroneous could not be equitable. The preposition "at" is inappropriate. The preposition should have been either "before" or "after" according as the one or the other meaning was intended. The meaning I think is "after." The word "at" speaks at the moment when the revaluation "came," not "was about to come," into force.

Questions put:

That the order of the Court of Appeal in Ireland and the order of the Master of the Rolls thereby affirmed be reversed.

The Contents have it.

That the following declaration be made:—"That the Commissioner of Police in estimating and apportioning the amount which he finds necessary for the maintenance of the Police Force, and for the several purposes of the Dublin Metropolis Police Acts under sect. 65 and sect. 66, sub-s. 2, of the Local Government (Ireland) Act, 1898, was and is bound to have regard to the valuation of the city of Dublin as it existed at and immediately after the date when the last previous general revaluation of the city under sect. 65 of the said Act came into force, subject to the cases mentioned in the proviso to sub-s. 2 of sect. 65."

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That this appeal be allowed, but that there be no costs here or below.

The Contents have it.

Solicitor for the appellant: *The Treasury Solicitor*, for *H. A. Wynne, Chief Crown Solicitor for Ireland.*

Solicitor for the Dublin Corporation: *R. Leslie S. Baldwin*, for *Ignatius Rice.*

Solicitors for the Dublin County Council: *J. M. M'Donnell & Co.*, for *W. J. Shannon.*

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May 13. June 10.

IN RE BUTLER.
JOYCE *v.* BREW.

Will—Residuary bequest to persons as joint tenants—Death of residuary legatees before testatrix—Lapse—One of residuary legatees leaving issue—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 33—*Next-of-kin—Marriage with deceased wife's sister prior to* 1907—*Right of issue of such marriage to share in undisposed of residue with issue by former marriage—Deceased Wife's Sister's Marriage Act*, 1907 (7 *Edw.* 7, *c.* 47), *s.* 2.

A testatrix by her will nominated her two sons, A and B, her residuary legatees. Both A and B predeceased the testatrix. A died in 1899, leaving issue a son, X, who survived the testatrix. B died in 1912 without issue.

Held, that sect. 33 of the Wills Act, 1837, does not apply to a joint legacy, and that the testatrix had died intestate as to her residuary personal estate. Statement in Jarman on Wills, 6th ed., p. 449, approved.

In addition to A and B, the testatrix had had two children by a second marriage, both of whom survived her. This marriage, which was contracted prior to 1907, was with the husband of her deceased sister.

Held, that the children of the second marriage were entitled to share in the undisposed of personal estate of the testatrix equally with her grandson by her first marriage, just as if the second marriage had always been legal. A prospective next-of-kin of a living person has not got such a title or interest as is saved by sect. 2 of the Deceased Wife's Sister's Marriage Act, 1907.

In re Beaupré's Trusts (21 L.R.I. 397) distinguished.

FURTHER CONSIDERATION.

The following statement of facts is taken from the judgment of the Master of the Rolls:—

This is a suit for the administration of the personal estate of Frances Alicia Butler, deceased. The decree was made on the

15th May, 1914, and the chief clerk's certificate was filed on the 9th November, 1917. The matter now comes on for further consideration, and the circumstances make the case rather special.

The deceased was twice married. Her first marriage was with a gentleman named Brew, by whom she had issue, two sons—Arthur Dominick Brew and Benjamin Thomas Brew—both of whom predeceased her. Benjamin Thomas Brew died in the year 1899, leaving him surviving his widow, the defendant Nellie Brew, and one child, the defendant Arthur Henry Brew, who is still living; Arthur Dominick Brew died on the 5th April, 1912, without issue. The deceased was married a second time, in the year 1875, to Joseph Stapleton Butler. He had been previously married to her sister, who had died. The marriage was invalid, but was legalized by the Deceased Wife's Sister's Marriage Act, 1907. There were two children of this marriage, Mary Joseph Glynn, and Frances Agnes Butler, both of whom are living.

The deceased, by her will dated 3rd May, 1878, reciting that she was possessed of eleven shares in the National Bank and six shares in the London and Westminster Bank, and that under the provisions of the will of her father, Benjamin Jackson, she would be entitled to certain sums of money and Government Stock in her said father's will particularly mentioned, and reciting that under her father's will she was empowered to appoint among her children certain other Government Stock, bequeathed to her two sons, Arthur Dominick Brew and Benjamin Thomas Brew, share and share alike, all her said Bank shares, and all her interest in the said money and Government Stock to which she would become entitled upon the death of her mother. These were the shares, moneys, and Government Stock mentioned in her father's will, and which were her own property. The testatrix then appointed to her said sons, Arthur Dominick Brew and Benjamin Thomas Brew, in equal shares, certain Government Stock over which she had a power of appointment. With this Stock we have nothing to do in this suit. It is not assets of the deceased, and if it is to be administered by the Court, that must be done in a suit to administer the trusts of the will of Benjamin Jackson.

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The testatrix afterwards provided that in case either of her said sons should happen to die under the age of twenty-one years, then her will was that everything thereby left or appointed to the one so dying should go to and vest in the survivor of her said two sons; and in case both her said sons should happen to die under the age of twenty-one years, she left and bequeathed all her said shares, money, and Government Stock unto and amongst her other children whom she had by her second marriage with Joseph S. Butler in such shares and proportions as he should by deed or will appoint, and in case none of her children by the said Joseph S. Butler should live to attain the age of twenty-one years, she left said shares, money, and Stock to the said Joseph S. Butler. She then gave some small pecuniary legacies, and nominated her sons, Arthur Dominick Brew and Benjamin Thomas Brew, her residuary legatees, and appointed her husband, Joseph S. Butler, her executor.

Her second husband predeceased her, and she died on the 1st October, 1912. Her two sons had attained twenty-one years before they died, so that the gift over of the specific bequests to them in the event of their dying under twenty-one did not take effect. Only one of the sons left issue, viz., Benjamin Thomas, who predeceased his brother Arthur Dominick.

Poole, for the plaintiff, the administrator with the will annexed of Frances Alicia Butler.

Dudley White K.C., for the defendants Nellie Brew and Arthur Henry Brew :—

As regards the specific bequest of bank shares and Government Stock to the testatrix's sons, Benjamin Thomas Brew and Arthur Dominick Brew, as tenants in common, Arthur Henry Brew takes the share of his father, Benjamin Thomas Brew, by virtue of sect. 33 of the Wills Act, 1837, while Arthur Dominick Brew's share falls into the residue.

As regards the residue, which was bequeathed to Benjamin Thomas Brew and Arthur Dominick Brew as joint tenants, there could be no lapse on the death of Benjamin Thomas Brew (Halsbury, Laws of England, xxviii, p. 613): *Davis* v. *Kemp* (1);

(1) 1 Eq. Cas. Abr. 216, pl. 7.

but by sect. 33 of the Wills Act, 1837, he must be deemed to have survived his brother by stirpital survivorship in the person of his son, Arthur Henry Brew. This is not a case of a gift to a class, but to two individuals as personae designatae.

If it be held that the residuary gift lapsed and there is an intestacy in respect of it, then Arthur Henry Brew is the sole next-of-kin of the deceased. The Deceased Wife's Sister's Marriage Act, 1907, made marriage with a deceased wife's sister legal, both prospectively and retrospectively, but sect. 2 of that Act provides that "no right, title, estate, or interest, whether in possession or expectancy, and whether vested or contingent at the time of the passing of this Act, existing in, to, or in respect of any dignity, title of honour, or property, and no act or thing lawfully done or omitted before the passing of this Act shall be prejudicially affected by reason of any marriage heretofore contracted as aforesaid being made valid by this Act."

Arthur Henry Brew, as a prospective next-of-kin of his grandmother, had a spes successionis which is an expectancy: *In re Beaupré's Trusts* (1). [O'CONNOR M.R.: That was a case of an irrevocable settlement; here the spes successionis could always have been defeated by the execution of a will.] He could have dealt with his interest as an existing title, though contingent as to enjoyment: *In re Beaupré's Trusts* (2). [He also referred to *In re Whitfield, Hill* v. *Mathie* (3).]

Leonard K.C., for the defendants Mary Joseph Glynn and Frances Agnes Butler:—

My clients are next-of-kin of the deceased by virtue of the Deceased Wife's Sister's Marriage Act, 1907. Sect. 2 was only intended to protect rights of property depending on anything having been done or omitted on the assumption of such a marriage being illegal: *In re Green* (4); *In re Parsons* (5). The spes successionis of Arthur Henry Brew, as one of the next-of-kin of the deceased, is not such an interest as would be protected by that section. No one can have an estate or interest in the property of

(1) 21 L. R. Ir. 397.
(2) 21 L. R. Ir. 397, at p. 409.
(3) [1911] 1 Ch. 310.
(4) [1911] 2 Ch. 275.
(5) 45 Ch. D. 62.

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another living person as his prospective heir-at-law or next-of-kin. It was more than a mere spes successionis that was dealt with in *In re Beaupré's Trusts* (1), which was considered in *Chichester's Estate* (2).

Sect. 33 of the Wills Act, 1837, has no application where there is a joint legacy. A joint legacy and a gift to a class have certain resemblances. There can be no lapse until the whole class or all the joint legatees have died. The death of one member of the class or one joint legatee does not cause a lapse; but the section only applies where the death of the legatee child would otherwise have caused a lapse: see Jarman on Wills, 6th ed., p. 449; *Olney* v. *Bates* (3); *Brown* v. *Hammond* (4); *Harvey's Estate* (5). These are all cases of gifts to a class, but the principle applies to cases of joint legacies. In either case only those take who survive the testator. In *Harvey's Estate* (5) the class consisted only of a single individual. How could the section be applied if both of the joint legatees had had children?

Dudley White K.C., in reply:—

The principle of gifts to a class does not apply to the case of a joint legacy: *Harvey's Estate* (5). The decision in *In re Beaupré's Trusts* (1) is binding on this Court, and Parker J. would have followed it in *In re Parsons* (6) if it had been an English decision.

Cur. adv. vult.

O'CONNOR M.R. (having stated the facts as above):—

I have first to determine how the circumstances I have mentioned affected the bequest of the bank shares and the Government stock. This was a specific bequest to Arthur Dominick Brew and Benjamin Thomas Brew, in equal shares, as tenants in common. Arthur Dominick predeceased the testatrix, and had no issue, so that his moiety fell into the residuary estate. But the bequest of the other moiety did not fail, because Benjamin Thomas left issue who survived him, and, under the 33rd section of the Wills Act, the specific legacy to him took effect as if he had

(1) 21 L. R. Ir. 397.
(2) [1908] 1 I. R. 297, at p. 317.
(3) 3 Drew, 319, at p. 333.
(4) John. 210.
(5) [1893] 1 Ch. 567.
(6) 45 Ch. D. 62.

survived the testatrix. As to this there is no controversy. Benjamin Thomas's moiety of the specific bequest, or so much of the specific property as remains to answer it, now goes to his personal representative, viz., his widow, Nellie Brew.

The question which has been argued arises out of the residuary bequest, which includes the lapsed moiety of the specific bequest. Nellie Brew, as the personal representative of Benjamin Thomas Brew, claims the entire residue on the ground that he must be presumed, under the 33rd section of the Wills Act, and in the circumstances, to have survived the testatrix, and, therefore, must be presumed to have survived his brother, Arthur Dominick, who predeceased her. If Benjamin Thomas in fact survived his brother and the testatrix, he would undoubtedly have taken the whole residuary estate as the survivor of two joint residuary legatees, and it seems clear that if he had survived his brother the whole residuary estate would have devolved upon him under the 33rd section as if he had survived the testatrix, he having left issue who survived him. But the question is, must he, because he ought to be presumed to have survived the testatrix, be also presumed to have survived his joint tenant, who died before the testatrix, but in fact survived him? I do not think that the 33rd section can be pushed thus far. Its object was to prevent the lapse of a legacy to a child when the child leaves issue surviving the testator. But there was no lapse of the residuary bequest by the death of Benjamin Thomas. The bequest was to him and his brother as joint tenants, which in effect was a gift to both, and, if one died, to the survivor. It cannot, therefore, be said that on the death of one there was a lapse, because by virtue of the bequest the survivor got the entire. If Arthur Dominick had survived the testatrix there would have been no lapse. The only lapse that took place was caused by his previous death, and as he had no issue the 33rd section did not operate. This is in accordance with the opinion of Mr. Jarman, adopted by the learned editors of the 6th edition of his book. At page 449 they quote as follows:—"Nor, it is conceived, does the statute touch the case of a gift to one of several persons as joint tenants; for as the share of any object dying in the testator's lifetime would survive to the other or others such event

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occasions no lapse." This seems to me to be entirely right in principle, and it governs the present case, and I must decide that the testatrix died intestate as to her residuary personal estate, and that it devolved on her next-of-kin.

Now, who are her next-of-kin? She left a grandchild by her first marriage, A. H. Brew, the child of Benjamin Thomas Brew. She also left two children by her second marriage, Mary Joseph Glynn and Frances Agnes Butler. This marriage was invalid up to the passing of the Deceased Wife's Sister's Marriage Act, 1907; but it became legalized by that Act, which operated retrospectively. It would appear, therefore, that the children of the second marriage are also next-of-kin of the testatrix, and entitled as such to her undisposed of personal estate along with her next-of-kin by the first marriage. The point, however, has been made by Mr. White, counsel for the grandchild, that the effect of the second section of the Act is to preserve his right as sole next-of-kin. That section provided for existing rights by enacting that "no right, title, estate, or interest, whether in possession or in expectancy, and whether vested or contingent at the time of the passing of the Act, existing in, to, or in respect of any dignity, title of honour, or property, and no act or thing lawfully done or omitted before the passing of the Act shall be prejudicially affected." It is urged that as the grandchild was at the date of the passing of the Act a prospective next-of-kin he had an interest in expectancy which was protected by the Act. But I cannot accede to this. A next-of-kin has no estate or interest of any kind in the assets of a living person. He has, at the very most, a spes successionis, which is not property or a right or title, estate or interest. Mr. White relied on *In re Beaupre's Trusts* (1), in which a fund was settled on a person for life, and after her death upon such persons as should be her next-of-kin according to the Statute of Distributions. The tenant for life died in 1885, and one of her next-of-kin was a married woman. It became necessary for the purposes of the Married Women's Property Act to determine when her title had accrued, and it was decided that it accrued during the life of the tenant for life. On this authority Mr. White contends that Arthur H.

(1) 24 L. R. Ir. 397.

Brew, as a prospective next-of-kin, had a title which was saved by the 2nd section of the Act of 1907. But *In re Beaupré's Trusts* (1) does not decide that a next-of-kin, as such, has any title to a living person's property. There the title was conferred by deed, and that title could not have been displaced by the disposition of any person. The title was, no doubt, contingent and expectant; but it could not be destroyed by will or deed, or by the exercise of any disposing power. But in the case of an expectant next-of-kin, whose expectancy is not aided by any paramount title, his future acquisition is wholly dependent on the non-exercise of the disposing power of a living person.

I am, therefore, of opinion that the 2nd section of the Act of 1907 does not touch the present case, and that the children of the testatrix are entitled to share in the undisposed of personal estate, just as if the second marriage of their mother had always been valid.

Solicitors for the plaintiff: *Blake & Kenny.*

Solicitor for the defendants Nellie Brew and Arthur Henry Brew: *W. P. Triston.*

Solicitor for the defendants Mary Joseph Glynn and Frances Agnes Butler: *P. M. Hosty.*

A. H. W.

(1) 21 L. R. Ir. 397.

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Jan. 23, 24, 30.

THE REPRESENTATIVE CHURCH BODY *v.* BARRY AND OTHERS.

Highway—New or substituted highway—Power to stop up road—Presumption of presentment by Grand Jury—Grand Jury Act, 1836 (6 & 7 *Wm.* 4, *c.* 116), *sect.* 60.

The defendants as a defence to an action for trespass set up a public right of way. The evidence showed that if any such public road ever existed, it had been stopped for over sixty years, and the public excluded therefrom, and a new road made.

Held, that the Court might and ought to presume a presentment by the Grand Jury stopping up the old road.

TRIAL OF ACTION.

The action was brought to restrain the defendants, their servants and agents, from trespassing on the lands of Kilcooley Glebe, and breaking down gates. The defendants by their defence alleged that the acts complained of were done in exercise of a public right of way.

Serjeant Matheson K.C., *Garrett Walker K.C.*, and *Sealy*, for the plaintiffs.

Carrigan K.C. (with him *S. L. Brown K.C.* and *Kinahan*), for the defendants:—

Proceedings before magistrates in England to stop a high road correspond to proceedings in Ireland under sect. 60 of the Grand Jury Act. Once we have established the existence of the old public road, the onus is on the plaintiffs to prove a valid presentment by the Grand Jury stopping it up and making a new road. The public cannot by non-user release their rights. Twenty years' user in defeasance of a right of the public in a river was held insufficient to defeat the public right: *Vooght* v. *Winch* (1); *Dawes* v. *Hawkins* (2); *Trustees of Rugby Charity* v. *Merryweather* (3); *Turner* v. *Ringwood Highway Board* (4); *Cubitt* v. *Maxse* (5); *Leigh Urban Council* v. *King* (6).

(1) 2 B. & Ald. 662.
(2) 8 C. B. (N. S.) 848.
(3) 11 East, 375*n*.
(4) L. R. 9 Eq. 418.
(5) L. R. 8 C. P. 704.
(6) [1901] 1 Q. B. 747.

Garrett Walker K.C., in reply:— *Dodd J.* 1918.

The onus in this case is on the defendants. There can be no public dedication of a right of way limited to the day-time. There can be no partial dedication: *Fitzpatrick* v. *Robinson* (1) *Rex* v. *Lloyd* (2); *Roberts* v. *Kurr* (3). A partial dedication would be void on the principle of repugnancy. To clothe long and undisturbed enjoyment with a legal title an Act of Parliament will be presumed: *Ex parte Raymond* (4). The Grand Jury had power under sect. 60 to close roads by presentment. The Court will presume a presentment: *Hanna* v. *Pollock* (5). A fair test of what is a public road is: Would the County Council be justified in spending money on the repair of it? *The King* v. *Newell* (6); *Dawson* v. *Mackay* (7).

REL. CHURCH BODY v. BARRY.

DODD J.:— Jan. 30.

The action is brought for an injunction to restrain the defendants, their servants and agents, from trespassing on the lands of Kilcooley Glebe, and breaking down gates thereon. The defence set up is that the acts complained of were done in pursuance of "a public right of way over the said lands from one public road to another public road for all persons during the day-time, to go and return on foot and with horses and carriages at their free will and pleasure." Before the trial the defendants served a notice to amend their defence by omitting from the defence the words "and with horses, cattle, and carriages." Mr. Brown, for the defendants, takes credit for so limiting the right. As there are two gates across the road, he says it is equally convenient for people with horses and carts to go round a slightly longer way as to open and shut these gates. The right now claimed is a right on foot by day. The continued existence of a public road for all purposes is, however, an essential part of his case.

The facts may be shortly stated. The present glebe was originally part of premises held by a mining company. When the

(1) 1 H. & B. 585.
(2) 1 Camp. 260.
(3) 1 Camp. 262 *n.*
(4) I. R. 8 Eq. 231.
(5) [1900] 2 I. R. 664.
(6) [1911] 2 I. R. 573.
(7) 38 I. L. T. R. 163.

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company got the land there was a road on it. That was between sixty and seventy years, or perhaps even longer, ago. The company built a house across the road for their manager, leaving an archway of sufficient width to admit a horse and cart underneath the upper story of the house. About the same time they put up two gates: one at the front entrance, and another at the back entrance. When the company ceased mining, this land which is now the glebe became vested in Mr. Lanphier; and from 1870 on he and his wife continued to reside there until his death. The gates were locked every night, and opened every morning. No casual visitor in the day-time was ever stopped, except, on one occasion, a drunken man. The children attending the school at Commons passed freely to and from school. It is pleasant to know that for sixty years the privilege was never abused. On one occasion only was there a complaint. Once a week one woman who had a donkey and cart passed through. This was by express permission. After Mr. Lanphier's death Mrs. Lanphier continued to reside in the place till she made a deed of gift of it to the plaintiffs.

Serjeant Matheson and Mr. Walker argued on these facts that there was no evidence of dedication by the owners. They cited *Fitzpatrick* v. *Robinson* (1); *Rex* v. *Lloyd* (2); *Roberts* v. *Karr* (3). Mr. Carrigan, in his reply, did not contest this.

The defendants say "once a highway always a highway," to which must be added a rider—"until it is stopped by competent legal authority."

They proved by an aged lady that she played upon this road when a child. They proved that the portion of a roadway lying between the front entrance and the public road on that side was metalled, and made as a roadway in the same way as adjoining public roads. They proved that the portion of the way between the back entrance and public road on that side was similar to the other portion, and they inferred a continuous roadway, and a roadway of a public character. That they said could not be stopped, except by a presentment of a Grand Jury, and no presentment was proved. Non-user does not create a presumption:

(1) 1 H. & B. 585, at p. 597. (2) 1 Camp. 260. (3) 1 Camp. 262 *n.*

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Dawes v. *Hawkins* (1); *Trustees of Rugby Charity* v. *Merrywcather* (2) (Lord Kenyon). They relied on *Vooght* v. *Winch* (3); *Weld* v. *Hornby* (4); *Turner* v. *Ringwood Highway Board* (5); *Cubitt* v. *Lady Caroline Maxse* (6); and Mr. Carrigan, with commendable frankness, and with a due regard to the duty he as an advocate owed to the Court, cited, though he sought, as was his duty to his client, to distinguish it, *Leigh Urban Council* v. *King* (7). The cases he cited show how carefully public rights are guarded.

If I were trying this case with a jury, I would submit two questions: (1) Was this way, prior to the building of the house and the erecting of the gates, a public highway? (2) If so, was it stopped? The only lawful means suggested by which a road at the time could be stopped was by a presentment of a Grand Jury. Mr. Brown and Mr. Carrigan would object to my leaving either question. They contend as to (1) that the evidence of this road having been a public road is so conclusive that no jury question arises. And as to (2) they contend that there was no evidence fit to be submitted to a jury that any presentment to stop the old road had been made. A presentment must be produced.

As to the first, it is to be observed that the defendants' case rests upon presumption. No proof has been given that this road ever was repaired by the county. Mining Companies had certain powers of making roads. The owners of land could make roads. The only evidence is the resemblance of this road to other county roads, and the fact that a lady still living and examined before me played upon this road when she was a young child. But against that is the fact that the Mining Company built a house across this road as soon as they got the land and put gates excluding the public. Is it probable they could have so acted if it were a county road? The asking permission of some of the inhabitants could not affect the matter. But assuming that it could, at most it is only evidence to be taken into consideration with all the other evidence. As to the second question, if as a juror I am entitled to find upon it without a presentment being

(1) 8 C. B. (N. S.) 848.
(2) 11 East, 375 *n.*
(3) 2 B. & Ald. 662.
(4) 7 East, 195.
(5) L. R. 9 Eq. 418, at p. 704.
(6) L. R. 8 C. P. 704.
(7) [1901] 1 Q. B. 747.

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produced, on the evidence I am satisfied that the making of a new road somewhat longer, but so as to avoid the mining operations that were contemplated, was carried out at or about the same time as the house was built across the old road, and the gates put up. The minefield, as it is called, was surrounded towards the new road with a good fence, and stone walls, a stile was left at the side of the gate, so that a person coming into the Mining Works would not be kept out. Mr. Brown, indeed, relies on the fact that the substituted road was called the "new" road. And he suggested that the archway was left underneath the upper portion of the house to preserve a public right for carts and carriages.

I draw quite different inferences. I infer that the new road was made, and made by the Mining Company, in order to prevent traffic by the old road; that the conferences with the inhabitants were either out of policy or to furnish evidence to the Grand Jury in an application to stop the old road; that the archway was made for the convenience of the company; there was probably a clerk's office for purposes of tally, with an opening to the gateway; that the gates were put up to secure the privacy of the manager's residence and to prevent trespass. The two questions intertwine. What was done was so open, so significant of an intention to exclude the public, that either there was no old road, or if road there had been, that it was closed by a valid presentment. And though non-user of itself might not raise a presumption, the continuance of the exclusion of the public by locked gates for more than sixty years does raise a presumption, and the contemporaneous acts may afford even a more violent presumption. That brings us to the real question: Can a valid presentment of the Grand Jury be presumed?

In Taylor on Evidence, 10th edition, p. 137, there is a general proposition that "royal grants, charters, and even Acts of Parliament have not infrequently been thus found by the jury, after long continued peaceable enjoyment, accompanied by the usual acts of ownership."

The Vice-Chancellor, in *In re The R.I.C. Act, Ex parte Raymond* (1), adopts the proposition, and makes it binding upon me. The presumption, however, is one of so far-reaching a kind that I

(1) I. R. 8 Eq. 231, at p. 235.

think it well to investigate it a little in detail to ascertain its limits as well as its value in administering justice. Royal grants go to the grantee, and so do Royal charters. Whether a complete record of all such grants or charters is, or perhaps I should rather say was, always kept in the Royal archives is not clear. Acts of Parliament are on the rolls. Taylor does not quote any case illustrative of the presumption of an Act of Parliament. The only case I can find is *The King* v. *Montague* (1). It is illuminative as to principle. The case arose on an indictment for cutting a trench across a common and ancient king's highway. The road in question was an embankment across Yantlet Creek, which unites the Thames and the Medway. It was proved that from time to time during twenty years then last past the inhabitants of Stoke and Grain had raised the embankment so high that no boats could pass over it at any time. When the embankment was cut down by the order of the Corporation of London the remains of an ancient bridge were discovered. It appeared to be of considerable dimensions both in height and width. No evidence was given as to when it was built or when it fell into decay, nor to show for what purpose it was built; but it was contended on the part of the defendants that it must be presumed to have been so constructed in order that it might not impede navigation, and having got so far, they then contended that it could not legally be put an end to without an Act of Parliament. The jury found the defendants guilty. Gurney moved for a new trial on the ground that the learned judge ought to have left it to the jury to say whether there had been anciently a public navigation through Yantlet Creek, and should have told them that such a navigation could be put an end to by Act of Parliament, according to the doctrine laid down by Holroyd J. in *Vooght* v. *Finch* (2). That is one of the cases relied upon by Mr. Carrigan. See how the matter was dealt with. Bayley J. (3) said—and this is the foundation of the proposition in the text-books—"Even supposing this to have been at some time a public navigation, I think that from the manner in which it has been neglected by the public, and from the length of time during which it has been obstructed, it ought to be presumed

(1) 4 B. & C. 598. (2) 2 B. & Ald. 662, at p. 670.
(3) 4 B. & C., at p. 602.

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that the rights of the public have been lawfully determined." There were three, possibly four, ways in which they could be determined—(*a*) by natural causes, the sea retreating, or the channel silting up; (*b*) by an Act of Parliament; (*c*) by writ of ad quod dammum; and perhaps (*d*) by Commissioners of Sewers. "For these reasons," he says, "it appears to me that if this case were sent down for trial again, the jury would be bound to find either that there never was a public navigation through the locus in quo or that it had been determined by some lawful means." And Holroyd J. says:—"It appears by the report of *Vaught* v. *Finch* (1) that I then stated that a public right of this description could only be determined by an Act of Parliament. I am bound to correct that opinion." He shows other methods, and concludes:—"There is no doubt such a public right may be extinguished by an Act of Parliament. In favour of the long enjoyment of the road in its present state I think we are bound to presume that if such a right of public navigation ever existed, it was determined by one or other of the means to which I have alluded." And Littledale J. is still more guarded—"I agree that, in order to quiet possession, we ought to make all reasonable presumption in favour of the existing state of things. But I am not disposed to act upon the presumption either of an Act of Parliament or a writ of ad quod dammum, or proceedings by Commissioners of Sewers, unless there be some evidence to warrant that presumption." He finds that the more reasonable presumption is that the passage, if it ever existed, was stopped up by natural causes.

That case came under review in *Williams* v. *Eyton* (2), a case not unlike the present in its facts. It was sought to set up a footpath on a disused highway. It was held that an order of two justices for stopping up an old road on the formation of a new one might be presumed. But Baron Watson, referring to *Rex* v. *Montague* (3), said, "I do not go so far as to say that an Act of Parliament might be presumed."

I have gone with some detail into this, because a general proposition in a text-book, or even in a judgment apart from the

(1) 2 B. & Ald. 662. (2) 2 H. & N. 771, and in Exchequer Chamber, 4 H. & N. 357. (3) 4 B. & C. 598.

facts upon which it is based, has a tendency to get extended beyond its real limit. These presumptions in our law of evidence need careful watching.

There is not the same difficulty in dealing with presentments. The Grand Jury in Ireland was not controlled by statute. Its procedure was not set down in any code or statute. It was not a corporate body. It was not a court of record. What arrangements were made for preserving documents I cannot tell. It cannot be assumed that every official in the office of the Secretary was methodical. Where is one to go to look for a presentment? Mr. Brown says in the Record Office. The Record Office can only keep what it has got. Did it get any presentments from this county? One does not even know the year. Was it before or after 1836? "The authority of the Irish Grand Jury in the Local Government of the county was a survival of very ancient power, dating from Anglo-Norman times; and the laws, customs, and traditions of 700 years were summed up and ascertained only in 1836 by the Irish Grand Jury Act, 6 & 7 Wm. IV, c. 116." (See article by Mr. (now Sir) Thomas Raleigh, in Chambers's Encyclopædia, vol. vi, p. 376.)

The jurisdiction over roads, exercised by the Grand Jury in Ireland, was in England in the hands of justices. They were very strictly controlled by statute. The cases cited by Mr. Carrigan are largely directed to their obligations. The order of justices was to be enrolled at quarter sessions. That was of course a court of record, and there was also a certificate required. In *Leigh Urban Council* v. *King* (1), having dealt with the possible loss of the certificate, Mr. Justice Phillimore, says: "There is much more difficulty in supposing the loss of an order of Quarter Sessions. But" (he goes on) "the duty of Judges in matters of ancient possession or in the exercise of public rights is to presume in favour of long, open, and continuous usage." And Bruce J., p. 754, says: "It is, I think, a very violent presumption that the public should acquiesce in the stopping up of the old road, unless it were done in a regular way." In *Williams* v. *Eyton* (2) the period was twenty-eight years; in *Leigh Urban Council* v. *King* (1) it was nearly sixty. Here it is certainly seventy, possibly more.

(1) [1901] 1 Q. B. 747. (2) 2 H. & N. 771, and in Exchequer Chamber, 4 H. & N. 357.

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I think I am within all the authorities in saying that a presentment may be presumed. On the facts I find that either there was no highway, or if there were an old road, that it has been legally stopped. That was the attitude of the Court in *The King* v. *Montague* (1).

Solicitor for the plaintiffs: *A. H. Morgan.*
Solicitor for the defendant: *F. J. O'Connor.*

D. M. S.

O'Connor J.
1918.
May 13.

M'MAHON *v.* M'MAHON.

Third-party procedure—Analogous procedure under Order 16, r. 55—Indemnity.

The plaintiff sought a declaration of trust in respect of lands conveyed by the first defendant to the predecessor in title of the second defendant. The second defendant claimed, by way of indemnity against the first defendant, such damages as might be suffered by reason of any breach of covenants for title entered into by the first defendant in the conveyance.

Held, that the procedure under Order 16, rule 55, analogous to third-party procedure under Order 16, rule 48 (which applies where a defendant seeks contribution or indemnity against a co-defendant), was inapplicable.

MOTION.

The action was brought by the plaintiffs for a declaration that by virtue of a conveyance dated 30th April, 1910, and in the events that happened, the defendant Helen M'Mahon was a trustee of the lands of Louth Hall for the residuary legatees under the will of Francis M'Mahon, deceased.

The plaintiffs were two of the children of Francis M'Mahon by his second wife, the defendant, Bridget M'Mahon. There was issue of Francis M'Mahon by his first marriage three children, and by his second marriage eight children. Francis M'Mahon died in 1892 possessed of property of considerable value consisting of cattle and farming stock and other chattels. He was also tenant from year to year of a farm of land comprising part of the lands of Louth Hall. By his will, dated 1889, after making certain other dispositions, he appointed the farm to his daughter, Mary M'Mahon, and bequeathed the residue of his property among the children of his second marriage, and appointed the defendant,

(1) 4 B. & C. 598.

Bridget M'Mahon, executrix of his will, to whom probate of the will was granted. The plaintiffs by their statement of claim alleged that Bridget M'Mahon had purchased the farm of Louth Hall with moneys forming part of the residuary estate of Francis M'Mahon. In the year 1910, Bridget M'Mahon "as beneficial owner," conveyed the farm for valuable consideration to her son, Joseph M'Mahon. Joseph M'Mahon married the defendant, Helen M'Mahon, and died in 1917 intestate, and letters of administration of his estate were granted to the defendant Helen M'Mahon. The plaintiffs claimed a declaration that the farm and chattels and effects formed part of the residuary estate of Francis M'Mahon, and that the defendant Helen M'Mahon was trustee of them for the persons interested in the residuary estate of Francis M'Mahon.

By notice under Order 16, Rule 55, the defendant Helen M'Mahon claimed a declaration that Bridget M'Mahon was bound to make good to her any loss or damage which she might suffer by reason of the breach of the covenants for title implied in the conveyance by Bridget M'Mahon, and to indemnify Helen M'Mahon.

Garrett Walker K.C. and *Tobias*, for the defendant Helen M'Mahon, referred to Order 16, Rule 55.

H. Wilson K.C. and *James Henry*, for the defendant Bridget M'Mahon.

In *Baxter* v. *France* (1) Lord Esher, at p. 594, held that the third-party procedure does not apply to a case like the present where its application "involves the trial of such a preliminary question as whether on the true construction of such an enactment as sect. 7 of the Conveyancing Act, 1881, a claim for indemnity arises."

H. R. Poole, for the plaintiff.

Garrett Walker K.C., in reply:—

Our claim here is for damages by way of indemnity. The party against whom we claim is already a defendant. In *Baxter* v. *France* (1) the claim by the third party could not be tried in the action, and this was the ratio decidendi of that case.

(1) [1895] 1 Q. B. 591.

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O'Connor J.:—

I am of opinion that this motion is not sustainable. What happened was this. The defendant Bridget M'Mahon sold certain lands to Joseph M'Mahon. The second defendant Helen M'Mahon is the personal representative of Joseph M'Mahon. The whole transaction between the vendor and the purchaser is impeached by the plaintiffs in this action on the ground that the lands were really not the vendor's to sell, because they were purchased by her with moneys which were not her own moneys, but formed portion of a trust estate to which the plaintiffs, with others, are entitled; that Joseph M'Mahon purchased with notice of the trusts, and accordingly the plaintiffs seek a declaration as against both defendants that the lands form portion of the trust estate. The action is in substance an equitable action of ejectment.

The defendant Helen M'Mahon claims that, inasmuch as the vendor conveyed these lands "as beneficial owner," the covenant for title implied by sect. 7 of the Conveyancing Act, 1881, is applicable, and that accordingly, in the event of this action succeeding, and of her being declared to be a trustee of the lands for the plaintiff, she would be entitled to damages against the vendor. In these circumstances the defendant Helen M'Mahon seeks, under Order 16, Rule 55, to apply to the dispute between herself and her co-defendant the procedure analogous to the third-party procedure under Order 16, Rule 48; and her notice of motion asks that I should give directions as to the trial of that issue.

I am of opinion that the procedure which is invoked does not apply to a case of this kind. Order 16, Rule 55, applies where the defendant seeks contribution or indemnity over against his co-defendant; the language of the rule being the same, so far as material, as that of Order 16, Rule 48, where a defendant seeks to bring in a party who is not a party to the action. The action here seeks to recover land; the claim by the one defendant against the other is to recover damages for breach of a contract to make good title to that land. That claim is not contribution or indemnity at all in my opinion. The relief sought

by Mr. Walker's client against his co-defendant not only is not the same as the relief sought by the plaintiffs, but it has no analogy to it; it is, on the contrary, a claim in respect of a contract, the breach of which sounds in damages that may or may not exceed the purchase price paid for the land. The fact that the breach of contract alleged has taken place in respect of the land which is the subject of the action does not bring the case within the rule, however convenient it might be, if the parties so agreed, to litigate the entire matter in this action. That is my view, though I would give Mr. Walker an opportunity of arguing it, if the case were not concluded by *Baxter* v. *France* (1), which was decided on somewhat different grounds. In that case, at p. 594, Lord Esher M.R. says: "Furthermore, I think that, where an application to a Judge at Chambers involves the trial of such a preliminary question as whether, in a case like this, on the true construction of such an enactment as sect. 7 of the Conveyancing and Law of Property Act, 1881, a claim for indemnity arises, that alone is sufficient ground for refusing to give directions." Further, in that case the same question was raised by the attempt to invoke the third-party procedure as is raised here. In this case the claim is not only for the actual purchase-money, but for other relief. What the other relief may be I cannot say, for it is referred to so vaguely in the notice as to warrant Mr. Wilson in saying that the motion is one of a roving character. At all events *Baxter* v. *France* (1) is an authority that where anything more than indemnity is sought (by which I take it is meant consequential damages) the case is not within the rule. That case is directly in point here, and accordingly I refuse the application with costs.

Solicitor for the plaintiffs: *Robert Dickie.*

Solicitor for the defendant Helen M'Mahon: *F. G. M'Keever.*

Solicitors for the defendant Bridget M'Mahon: *Donaldson & Coulter.*

D. M. S.

(1) [1895] 1 Q. B. 591.

[Note.—See *Marten* v. *Whale*, [1917] 1 K. B. 544, where the same principle was decided as to the purchase of a chattel.—REP.]

Appeal.
1918.

Feb. 26, 27.
May 6, 7.

ESTATE OF KNEELAND AND REVELL (1).

Land Purchase Acts—Superior interest—Redemption price—Court of Appeal fixes the amount.

On an application to redeem and fix the redemption price of a head rent of £48 14*s.* payable out of an undivided seventh of lands sold under the Land Purchase Acts and other lands, it appeared that the annual rental of the entire lands was £251 9*s.*; the poor law valuation £244 17*s.*, and the estimated cash value £3,056. Wylie J. fixed the redemption price at £840.

The Court of Appeal, being of opinion that the price so fixed was too high, fixed the price at £600.

APPEAL by the vendors from an order of Wylie J. fixing the redemption price of a head rent payable out of the lands sold in this matter under the Land Purchase Acts and other lands.

By lease, dated the 29th January, 1819, W. H. Carter demised to William Revell one-seventh part of the town and lands of Aughavanagh, in the county of Wicklow, for the term of 999 years, subject to the yearly rent, subsequently adjusted to £48 14*s.*, and to the covenants and conditions therein contained. William Revell then or subsequently became entitled as well to two and a-half undivided sevenths of the said lands in fee-simple.

By deed of partition, dated the 19th April, 1822, made between all the persons interested in the lands, with the exception of the said W. H. Carter, part of the said lands, equivalent to three and a-half sevenths of the whole, were allotted in severalty to William Revell, subject to the rent and covenants in the lease. The partition deed did not contain any provision specifically charging the rent on the lands so allotted in severalty, nor any covenant of indemnity in respect of the head rent.

All the estate and interest of William Revell in the lands, so allotted in severalty to him, subsequently became vested in

(1) Before SIR IGNATIUS J. O'BRIEN C., and RONAN and MOLONY L.JJ.

the vendors, who had sold the same under the Land Purchase Acts. The interest of W. H. Carter under the lease was now vested in T. W. Lloyd.

From the evidence as to the value of the entire lands, out of one-seventh of which the head rent of £48 14*s.* was payable, it appeared that the annual rental was £251 9*s.*, the poor law valuation was £244 17*s.*, the estimated value, in 3 per cent. stock, including the purchase-money of the lands sold in the matter, and the purchase-money of part of the other lands which had been agreed to be sold, was £5,064, equivalent at the price of the day to £3,056 cash. One-seventh approximately of these respective sums would be, rental, £36, poor law valuation, £35, estimated purchase-money in stock, £723, equivalent to £437 cash.

On the application of the vendors to redeem and fix the redemption price of the head rent of £48 14*s.*, Wylie J. made an order declaring that the whole of the lands sold herein were bound in equity under the provisions of the partition deed to indemnify the other lands comprised in the lease against the entire of the head rent, and ordered that the redemption price of the head rent be satisfied out of the purchase-moneys herein generally, and fixed such redemption price at the sum of £840.

From this order the vendors now appealed, and in lieu thereof asked for an order declaring that the indemnity (if any) implied by the said partition deed must be limited to and could not exceed the value of one-seventh of the lands thereby conveyed and assigned, and further that the redemption value of the said head rent was limited by and could not be fixed at a greater sum than one-seventh of the value of the entire of the said lands.

J. Leech K.C. and *J. E. Walsh*, for the vendors, the appellants :—

The Court of Appeal will review the price fixed for a superior interest : *In re Close's Estate* (1). The price fixed by Wylie J. is excessive. In the circumstances of the case the redemption value of the head rent cannot exceed one-seventh of the cash value of the entire lands out of which it is payable. The way to test the

(1) [1905] 1 I. R. 371.

Appeal. 1918. *In re* KNEELAND & REVELL'S ESTATE.

matter is to see what would be done if a similar rent were reserved out of each undivided seventh of the lands. The right of the vendors was to compel the owner of the rent to partition, and to accept one-seventh of the lands in severalty: *Baring* v. *Nash* (1). That right attached to the purchase-money.

W. M. Jellett K.C., E. S. Murphy K.C., and *A. B. Babington K.C.*, for T. W. Lloyd, the respondent:—

Wylie J. had all the facts before him, and has fixed the redemption price on the proper basis. The Court should not interfere with the price so fixed. Every acre of the lands comprised in the lease was subject to this head rent. Under the terms of the lease the costs of partition would have fallen on the vendors. The prospect of having to pay the cost of a partition suit would have been sufficient to prevent them from proceeding to partition.

THE COURT intimated that it had jurisdiction to fix the price itself. Holding that £840 was excessive, it fixed the price at £600, the vendors undertaking to pay this sum out of the purchase-money of the lands sold in this matter.

The curial part of the order was as follows:—

It is ordered that the said order, so far as the same is appealed from, do stand discharged, and the vendors by their said counsel in open Court undertaking to pay the entire of such sum as may be fixed by this Court as the redemption price of the said rent of £48 14s., exceptions, reservations, and reversion out of the purchase-moneys herein, the Court doth fix the said redemption price at £600; and it is further ordered that the respondent, the said Thomas W. Lloyd, do pay to the appellants, the said Arabella Charlotte Kneeland, George Ronan Revell, and Rev. Edward Alexander Fishbourne, one moiety of their costs of and incident to this appeal when taxed and ascertained.

Solicitors for the appellants: *Martley & Barlee.*
Solicitors for the respondent: *J. L. Scallan & Co.*

C. L.

(1) 1 V. & B. 551.

JULIA MARIA MURPHY, A REGISTERED OWNER OF LAND.
(FOLIO 1286. CO. KILDARE.)

Ross J.
1918.
June 7.

Land Registry—Practice—Registered owner a lunatic not so found—Execution of transfer by Committee—Appointment of Guardian—Lunacy Regulation (Ireland) Act, 1871 (34 *Vict. c.* 22), *ss.* 68 *and* 69; *Local Registration of Title (Ireland) Act*, 1891 (54 & 55 *Vict. c.* 66), *s.* 75, *sub-s.* 2.

The appointment of a guardian under s. 75, sub-s. 2, of the Local Registration of Title (Ireland) Act, 1891, is not necessary for the purpose of executing a transfer of registered land, the owner of which is a person of unsound mind not so found by inquisition, a committee of his estate having been appointed by the Lord Chancellor. Such committee is a fit and proper person to execute such transfer.

MOTION by way of appeal from the Registrar of Titles.

Julia Maria Murphy, an owner of registered land, being of unsound mind (no inquiry under a Commission of Lunacy having been directed), Patrick Murphy was on September 12th, 1916, appointed Committee of her estate by the Lord Chancellor under the summary provisions of sects. 68 and 69 of the Lunacy Regulation (Ireland) Act, 1871 (34 Vict. c. 22). A transfer, dated February 1st, 1918, of the registered lands to Robert Boylan, having been executed by Patrick Murphy, the Registrar of Titles, by ruling, dated May 16th, 1918, refused to register the transferee as owner until the provisions of sect. 75, sub-s. 2, of the Local Registration of Title (Ireland) Act, 1891 (1), should be complied with. From this ruling the Committee appealed.

Pigot K.C. (with him *J. A. Costello*), for the Committee:—

Is sect. 75 of the Act of 1891 to be read literally or not? A distinction is taken between a lunatic so found and a person of unsound mind not so found. It is submitted that the true construction of the section is that, where a committee of the estate is

(1) S. 75 (1). In the case of a lunatic so found by inquisition, the committee of his estate may represent him for all or any of the purposes of this Act. (2) In the case of a person of unsound mind not so found by inquisition, the Court may from time to time appoint a guardian to represent him for all or any of the purposes of this Act.

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appointed by the Lord Chancellor, that case comes within sub-s. 1, and that sub-sect. 2 is only a relieving sub-section. The lunatic being under the care of the Lord Chancellor, and there being a Committee appointed, it is not necessary to have a guardian appointed.

[Ross J.:—Why can I not appoint the existing Committee as guardian?]

Such cases as this often occur, and applications to the Court would involve needless expense. [Counsel read sects. 68 and 69 of the Lunacy Regulation (Ireland) Act, 1871.] It is submitted that sect. 69 is a "deeming" section: see the judgment of Ronan L.J., in *The Attorney-General* v. *The Corporation of Dublin* (1), and the cases there collected.

[Ross J.:—Does not that only apply inter partes?]

Put it rather that a "deeming" section is not to be applied in such a way that the interests of third parties might be affected. Taking sect. 75, sub-s. 1, would it be a forced construction to read for "lunatic so found," "lunatic so found or deemed to be so found"?

[Ross J.:—You say that sub-s. 2 refers to a case where a lunatic is not under the Lord Chancellor's care at all?]

Yes. A reference to the record of *Lytle* v. *Baker* (2), referred to in the note to sect. 75 in Browning and Smith's Registration of Title in Ireland, p. 181, shows that that case has no bearing on this case. In *In re Callan* (3) there is no reference to the Lord Chancellor's having taken the lunatic under his care at all. Further, once the Lord Chancellor's jurisdiction has been invoked and put in motion, it is arguable that no statute which does not expressly name the Sovereign is to be construed as in any way limiting the exercise of the prerogative. That prerogative embraces the care of both idiots and lunatics, the latter word including persons of unsound mind: see Pope on Lunacy, ed. 1877, p. 19. This is a prerogative, not a statutory, jurisdiction. The Lunacy Regulation (Ireland) Act, 1871, does not purport to confer the jurisdiction, but only to regulate the method of its application: see the Preamble and Full Title.

(1) [1917] 1 I. R. 401, at p. 436. (2) Unreported.
(3) 47 I. L. T. R. 235.

His Lordship reversed the ruling of the Registrar, the Court being of opinion that the Committee of the estate of a person found to be of unsound mind by order of the Lord Chancellor of Ireland, duly appointed as such Committee, is a fit and proper person to execute the necessary deed of transfer.

Ross J. 1918. *In re* MURPHY.

Solicitor for the applicant: *T. O'K. White.*

T. C. T.

O'Connor J.
1918.
June 5.

LAMB *v.* FRENCH.

Trustee—Powers—Charges in equal priority—Proposed immediate payment of one charge and appropriation to provide for others.

Certain capital charges declared by the instruments creating them to be in equal priority became payable at different dates. One of the charges amounting to £4000 was immediately payable. The lands charged having been sold, the trustees of the estate applied to the Court asking in substance whether they were at liberty to pay the £4000 charge on setting apart so much of the proceeds of the sale of the estate as should be reasonably likely to secure payment in full of the remaining charges as and when they became payable.

Held, that the trustees could not pay off the charge of £4000, and segregate the proceeds of the land to meet the charges and thereby absolve themselves from liability.

ADJOURNED SUMMONS.

Arthur, fourth Baron De Freyne, was seised in fee-simple, subject to incumbrances amounting to £57,000, of certain hereditaments in the counties of Roscommon and Sligo. He had five brothers and one sister, and by an indenture of settlement, dated the 21st November, 1876, he demised the lands to trustees for a term of 500 years upon trusts to be declared in six several deeds, and subject thereto upon trust to allow the rents and profits to be received by himself the said fourth Baron De Freyne, his heirs, and assigns. By six deeds, all dated the 22nd November, 1876, it was declared that the trustees should hold the term of 500 years upon trust to raise six annuities of varying amounts, £2,150 in all, to be paid to the five brothers and to the sister of the fourth Baron De Freyne during their respective lives, each of the annuities being reducible to a lesser sum in the event of the annuitant becoming bankrupt or attempting to assign or incumber his or her interest in the annuity; and upon further trusts to raise six sums in gross of varying amounts, £38,000 in all on the death of each annuitant, as portions for his or her children who being sons should attain the age of twenty-one, or being daughters should attain that age or marry. All these deeds were voluntary deeds.

Upon his marriage with Lady Laura Octavia Dundas, the fourth Baron De Freyne settled the lands by a deed dated the 6th February, 1877. Under this settlement the lands were limited to him for life, and after his decease subject to a jointure for his wife and portions for the younger children to the first and every other son of the marriage successively in tail-male. This settlement was subject to the annuities and sums in gross already mentioned. He also thereby reserved power to mortgage the property to the extent of £5,000 for his own use, and to jointure an after-taken wife, and to charge portions for the children by such after-taken wife. The power of mortgaging was subsequently exercised.

There were issue of the marriage two children, namely, Arthur Reginald French, afterwards fifth Baron De Freyne, and one daughter, who died under the age of twenty-one.

Laura Octavia, Lady De Freyne, died in 1881; and in 1882 the fourth baron married Marie Georgiana Lamb, and by a settlement, dated the 27th September, 1882, and made in exercise of the powers reserved to him by the prior settlement of the 6th February, 1877, he charged the lands with a jointure in favour of the said Marie Georgiana, Lady De Freyne, should she survive him, and with portions for the children of the marriage. There were ten children of this marriage, the defendant, Francis Charles French, afterwards sixth Baron De Freyne, being the eldest son.

On the 11th July, 1901, the fourth Baron and his son, Arthur Reginald French, joined in a re-settlement of the lands subject to the annuities and sums in gross. Arthur Reginald was given a rentcharge of £100 a year during the joint lives of his father and himself; and the estates were then limited to the fourth Baron for life, in restoration and by way of confirmation of the life estate limited to him by the settlement of the 6th February, 1877, with remainder to Arthur Reginald for life, with remainder to his first and other sons successively in tail-male, and in default of such issue, to the fourth Baron and his heirs.

In 1906 the estates were sold under the Land Purchase Acts, with the exception of the demesnes of French Park and Erritt, and the residue of the purchase-money, amounting after payment

O'Connor J. 1918.

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of the incumbrances for £57,000 to about £131,000, was paid to the plaintiffs, who had been appointed trustees for the purposes of the Settled Land Acts of the settlement constituted by the several deeds already mentioned and hereinafter together referred to as the compound settlement.

Arthur, fourth Baron De Freyne, died on the 22nd September, 1913, having by his will, dated the 5th August, 1901, devised all the lands and hereditaments limited to him in fee simple in remainder as aforesaid to the use of the said Francis Charles French for life, with remainder to his first and every subsequent son successively in tail-male. Upon the death of the fourth Baron, Arthur Reginald French, the fifth Baron entered into possession and enjoyment of the property as tenant for life in possession under the limitations in the re-settlement of the 11th July, 1901.

On the 9th May, 1915, the fifth Baron was killed in action in the present war. He left no issue, and was succeeded by the defendant, Francis Charles, the sixth Baron, who became entitled to the settled property as tenant for life under the re-settlement of 1901 and the will of Arthur, fourth Baron De Freyne.

All the brothers of the fourth Baron save one, John French, who had died on the 23rd May, 1916) were living. His sister, Mary French, who had intermarried with Valentine Joseph Blake, was also living, and was joined as a defendant in the summons.

Some of the brothers had attempted to incumber their annuities, whereby these had become reduced. Four of the brothers had married, and had issue living. There were also issue of the marriage of Mrs. Blake living.

On the death of the said John French, who left a widow and issue surviving, the gross sum of £4,000 became raisable out of the settled property. This sum of £4,000 was charged upon and made payable out of the estates in the same priority as the several other annual and principal sums which Arthur, the fourth Baron, had charged thereon in favour of his four other brothers and his sister and their respective children by the several deeds executed on the 21st and 22nd November, 1876.

After the death of the fifth Baron a petition was presented by the defendant, the sixth Baron, to the King's Bench Division by

way of appeal against the claim of the Commissioners of Inland Revenue that for the purposes of the assessment of the estate duty payable on the property comprised in the compound settlement and passing on the death of the fourth Baron the value of the annuities and gross sums charged by the deeds last mentioned should not be deducted. It was decided in *Lord De Freyne* v. *Inland Revenue Commissioners* (1) that the property passing upon the death consisted of the hereditaments diminished by the value of the annuities and gross sums. The amount of such estate duty had not yet been ascertained and assessed, but the value of the settled moneys had been ascertained to be the sum of £116,485 3*s.* 9*d.*, and the value of the said annuities and sums in gross had been ascertained to be the sum of £45,662, as of the date of the death. The Crown duties payable in respect of the settled properties on the death of Arthur Reginald, fifth baron, had not yet been ascertained or assessed, nor had any duty which might be payable on the death of the said John French been paid.

On the 28th day of February, 1918, the plaintiffs issued an originating summons asking, among other questions—1. Whether the plaintiffs, as trustees, could safely pay the charge of £4000, which had become payable on the death of the said John French, on setting apart so much of the proceeds of the sale of the estate subject to the charges as would probably provide for the payment of the other charges of equal priority with the charge of £4000 as they became payable? 2. How the Crown duties that had become payable were to be paid or provided for?

It was also asked by the summons that if and so far as might be necessary the trusts of the compound settlement should be carried into execution under the direction of the Court. Expert evidence was given that the gross market value of the securities representing the capital moneys in the hands of the plaintiffs as trustees of the compound settlement was—1, on September 22nd, 1913, £116,485 3*s.* 9*d.*; 2, on May 9th, 1915, £108,393 0*s.* 11*d.*; 3, in March, 1917, £89,541 15*s.* 3*d.*; 4, on November 14th, 1917, £93,942 8*s.* 1*d.*

(1) [1916] 2 I. R. 456.

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LAMB v. FRENCH.

Hugh Kennedy, for the plaintiffs, the trustees of the compound settlement:—

We come to the Court for directions as to how to deal with several difficulties in administering the trust property. The several life annuities and charges in gross created by the six deeds of 22nd November, 1876, are expressly declared to be charged on the De Freyne estates in equal priority. By the effect of the decision in *Lord De Freyne* v. *Inland Revenue Commissioners* (1) the large claim of the Crown for estate duty payable in respect of the De Freyne estates on the death of Arthur, fourth Baron De Freyne, is a charge puisne to the annuities and charges created by the deeds of 22nd November, 1876. The trustees must now raise and pay the amount of this claim on the part of the Crown. Moreover, by the recent death of the Hon. John French the charge of £4000, created by the deed of 22nd November, 1876, under which he was a life annuitant, has become immediately payable. How are these two claims to be met? The settled properties show a substantial margin of value over the total amount of the charges, and a considerable sum of capital moneys has lately come to the hands of the trustees by the payment off of one of the investments. May they apply the moneys in paying off the two claims referred to, or must they raise the moneys required by mortgage of the settled properties? If they are compelled to borrow on mortgage, the income of the present tenant for life will be substantially reduced, while there does not appear to be any real risk to the remaining chargeants in applying capital moneys in clearing off these immediate claims. Mr. Justice Barton referred to the chief clerk to inquire into the matter for the guidance of the Court. The trustees presented evidence to the chief clerk, and formulated the scheme which is now before the Court on a memorandum from the chief clerk. By that scheme a number of securities selected by competent stockbrokers would be earmarked or appropriated as a provision for all the other charges affecting the trust estates as they arise. The securities selected are as safe as can be chosen, and provide a substantial margin for depreciation. It is proposed to pay the two immediate claims out of funds not included in the appropriation. The trustees submit

(1) [1916] 2 I. R. 456.

this scheme as an alternative to borrowing on mortgage, which in the circumstances would be very difficult, if not impossible. If some such scheme is not approved by the Court, the trustees will ask the Court to direct that the whole trust be administered in Court for their protection. The consideration of the other questions raised by the summons may be postponed for the present.

Meredith K.C. and *Poole*, for Francis Charles Baron De Freyne, in support of the application:—

The Court has jurisdiction, and ought to sanction the application. Suppose there had been no sale of the estate charged with the charges created by the deeds of 1876, but that the estate was actually and physically land, the £4000 then would be presently raisable out of the settled property. The children of John French would be entitled to be immediately paid, and they could apply to the Land Judge's Court and ask for a sale, which would be ordered, because there is no power to prevent a sale being had by a puisne incumbrancer; and the most that could be done would be that in the course of the proceedings a sufficient part of the lands charged would be sold to meet the other charges arising in futuro and the cash produced would be invested and the income paid to those entitled, and the owners of the capital sum could have recourse to the investments alone, and have to put up with any loss owing to deficiency in value. [They cited *Nightingale* and *Reynolds* (1).]

Jellett K.C. and *J. E. Walsh*, for the Honorable Mary Blake (appointed to represent a class entitled to share in the charges created by the deeds of 1876 other than the charge of £4000 in favour of the French family):—

There is no power on this application to authorize the trustee to set aside specific sums of money or stocks to meet the charges secured by the indentures of 1876, after paying the charge of £4000; nor have the trustees any power to pay off the charge of £4000 without providing for the payment of the other charges.

We submit the trusts of the compound settlement ought to be administered under the direction of the Court.

(1) [1902] 2 Ch. 117.

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H. Wilson K.C. and *Longfield*, for the defendant, Charles French the surviving trustee of the deeds executed in 1876:—

The trustees of the compound settlement cannot by appropriating any of the investments to the annuities and gross sums deprive the holders of these charges of the security of the residue of the funds. The evidence shows a serious depreciation of the investments since the year 1913. Sect. 5 of the Conveyancing Act, 1881, shows that the protection against liability for depreciation of investments given to a vendor who pays a sum into Court to provide for an incumbrance, is purely statutory.

Norwood K.C., for Mrs. John French and those entitled to share in the £4,000 charge in favour of the French family.

Carrigan K.C. and *A. H. Webb*, for incumbrancers.

June 5.

O'CONNOR J.:—

The important point to note in connexion with these deeds is that, although the capital charges become payable at different dates, they are expressly declared to be in the same priority. It seems, therefore, perfectly clear that to pay one without making certain provision for the payment in full of the others would be a breach of trust, and the trustees, in the event of a deficiency, would be liable. In these circumstances the trustees come to the Court and in substance ask the question—are they at liberty to set apart so much of the proceeds of the sale of the estate as, in all reasonable probability, will pay these charges, and thereby exonerate themselves from all responsibility? In my opinion they are not. In effect, the proposal is to substitute for one security a different and much less security. What authority or justification is there for that? No case was cited to me, and I assume none can be found.

It seems to me that the case must be considered precisely as if the charges had been created for valuable consideration. It cannot for a moment be suggested that a mortgagee can be compelled to take as security for his mortgage something less than he bargained

for. The persons claiming under these deeds are entitled to precisely the same protection from the Court as a mortgagee for valuable consideration. Mr. Meredith argued thus:—He said, and rightly, that the children of John French are entitled presently to look for payment of the £4,000; that, if the lands were still lands, they could go to the Land Judge's Court and ask for a sale; that such sale would be directed, but in the course of the proceedings a sufficient portion of the lands would be sold to meet the other future charges; and that finally when sufficient cash was produced to meet all the charges it would be invested and the income paid to those entitled to it; and that the payees of the capital sums could have recourse to such investments and to them alone, and would therefore have to abide any loss that might arise from their falling in value. That may be so; but assuming that it is so, it is not the case here. If it be a necessary incident of such proceedings that the chargeants would have to stand or fall by the investments representing at the time of the proceedings the cash value of the charges, my answer is that I am not concerned with such proceedings. I am merely asked whether the trustees can of their own accord set aside a fund to meet these charges, which is quite a different matter. I treat them as mere owners of land subject to charges; they cannot segregate part of the land or part of the proceeds of the land to meet these charges and thereby absolve themselves from liability. If they had power to do that at all, they could do it without any sanction or authority or direction from me.

Mr. Wilson relied on sect. 5 of the Conveyancing Act, 1881, for the purpose of showing that it requires an express legislative enactment to enable a Court in selling incumbered land to set aside a fund to meet contingent liabilities and to sell discharged from the same. That is a strong argument to show that I have no authority, in the present proceedings, to sanction what is proposed here, though I may remark that what I am asked is not to sanction the proposed action of the trustees, but to say whether the trustees have the legal right to take such action.

So much as to the setting aside of this large sum to meet all the future charges. What of the payment of the £4,000, and the estate duties which are now payable?

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Having regard to the amount of funds in the trustees' hands, there does not seem to be the slightest possibility of the security for the other capital sums being imperilled by payment thereof. But the trustees wish to be protected by an order to administer the trusts, and accordingly I make an order to have the trusts carried into effect under the direction of the Court; and I have no doubt but that some method will be found whereby these charges can, in the course of such proceedings, and by order of the Court, be paid. It may be that the foundation of such order will be the circumstance that the risk is so remote as to be treated as non-existent. However, that is a matter for future consideration.

Solicitors for the plaintiffs: *O'Hagan & Son.*
Solicitors for the Hon. Charles French: *Roche & Sons.*
Solicitors for Lord De Freyne: *O'Hagan & Son.*
Solicitors for Mrs. Blake: *Roche & Sons.*
Solicitors for Mrs. French: *Wynne & Wynne.*
Solicitors for incumbrancers: *O'Keeffe & Lynch.*

R. W. L.

CAMPBELL, DECEASED.
M'CABE *v.* CAMPBELL.
(1918. No. 496.)

O'Connor J.
1918.
June 17.

Will—Construction—Punctuation—Gift of farm and chattels to wife to manage to best advantage of self and children—Trust—Joint tenancy—Beneficial interest.

A testator left his farm and chattels to his wife "she to have and manage same to the best advantage to herself and her five children (naming them)."

Held, that the widow took as trustee for herself and her five children as joint tenants.

It is from the words and context of a will and not from the punctuation that the sense must be collected.

ORIGINATING SUMMONS.

By his will, dated March 1st, 1907, William Campbell provided as follows:—

"I hereby leave to my wife, Mary Campbell, my farm of land, with dwelling-house and offices thereon. I also leave her all my stock on hands, horses, cattle, and chattels, which I may die possessed of, she to have and manage same to the best advantage to herself and her five children, viz., James, Catherine, Elizabeth, Minnie, and William." Testator appointed the plaintiffs his executors. He died on the 19th April, 1907, and probate was duly granted on the 29th February, 1908. There appeared to be in the original will a full stop after the word "thereon."

After the death of the testator, his widow (the defendant Mary Campbell) and his children continued to reside together on the farm, the youngest (the defendant William) being aged twenty-one years at the date of the testator's death.

The plaintiffs issued an originating summons for the determination of the questions arising for decision.

Sainsbury, for the plaintiffs.

Cusack for the defendant, the widow of testator:—

The widow takes the farm absolutely. It is the subject of a separate bequest absolute in its terms. The qualification "to have and

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manage same to the best advantage to herself and her five children" applies only to the stock on hands, horses, cattle, and chattels, and not to the farm. This qualification in the case of the chattels supplies the motive of the testator only, and does not create a trust, and the widow also takes the chattels absolutely. See *Thorp* v. *Owen* (1); *Mackett* v. *Mackett* (2); *Bond* v. *Dickinson* (3); *Greene* v. *Greene* (4); *Lambe* v. *Eames* (5); *Berryman* v. *Berryman* (6); Farwell on Powers (1916 ed.), at p. 541, et seq. See also *In re Adams and the Kensington Vestry* (7), and *In re Humphrey's Estate* (8).

The trend of modern decisions is against the creation of a trust, unless the language compels the Court to draw such inference. See the observations of Lindley M.R. in *In re Williams* (9).

In the original will in this case there is a full stop after the word "thereon," which shows an intention to give the farm to the widow absolutely. See *Houston* v. *Burns* (10).

M'Cann K.C., for the defendant William Campbell:—

Punctuation is not to be considered in construing a will. See the observations of Lord Westbury in *Gordon* v. *Gordon* (11), where he says:—"I entirely concur in the opinion expressed by Sir William Grant in a case before him: that it is from the words and from the context and not from the punctuation that the meaning of the testator is to be collected."

On the plain grammatical construction of the will the widow takes as trustee for herself and her children as joint tenants. In *Hickey* v. *Hickey* (12) the words were "to be managed as best she could for the benefit of their children"; and it was held that the children were entitled beneficially. A fortiori "to be managed for benefit of herself and children" means the gift of a beneficial interest to herself and children. See also *O'Connor* v. *Butler* (13); *In re Sproule, deceased, Chambers* v. *Chambers* (14).

(1) 2 Ha. 607, 615, 616.
(2) L. R. 14 Eq. 49.
(3) 33 L. T. N. S. 221.
(4) I. R. 3 Eq. 90, 629.
(5) L. R. 8 Ch. App. 597.
(6) [1913] 1 I. R. 21.
(7) 27 Ch. Div. 394.
(8) [1916] 1 I. R. 21.
(9) [1897] 2 Ch. 12.
(10) [1918] A. C. 337, at p. 342.
(11) L. R. 5 H. L. 254, at p. 276.
(12) [1913] 1 I. R. 390.
(13) [1907] 1 I. R. 507, 510.
(14) 49 I. L. T. R. 96.

O CONNOR J.:—

The first question to be determined is whether the bequest to the widow of property, "to have and manage same to the best advantage to herself and her five children," relates merely to the farm, or includes both stock and farm. Mr. Cusack has relied on the circumstance that in the original will there is what looks like a full stop after the word "thereon." But *Gordon* v. *Gordon* (1), which has been cited by Mr. M'Cann, shows what scant attention (if any) is to be paid to punctuation in a will. Indeed, the present case shows the wisdom of that rule, for I find what also looks like a full stop in another part of the will, when by no possible hypothesis should there be a full stop, namely, after the word "hands." I doubt if either mark was meant to be a mark of punctuation, and, accordingly, I leave the question of punctuation out of consideration altogether.

The words I have mentioned seem to me to refer to the entire property before mentioned, the land as well as the stock. That is the sense to be taken from the collocation as well as the more appropriate sense, having regard to the subject-matter.

The next question is one of greater difficulty. Mr. Cusack says that the widow gets all the property absolutely. Mr. M'Cann, on the contrary, contends that she takes a beneficial interest with her children as joint tenants. The general principle is well settled. A testator sometimes uses language which, taken by itself, amounts to an absolute gift, but follows it up by language which raises a contention whether he meant to impose on the donee a trust in favour of other persons, or whether he merely meant to express his motive for the gift—for example, his belief that the donee would devote the gift, wholly or partly, to such other persons. In such cases a gift, in terms absolute, will not be cut down or reduced to a trust by the use of language which is consistent with a mere expression of motive for the gift. Mr. Cusack contends that in applying this principle there is a tendency in recent authority to construe the will so as to give an absolute interest. If by tendency he means a disposition or bias in favour of an absolute interest as against a trust, I cannot follow him. The only safe

(1) L. R. 5 H. L. 254, at p. 276.

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rule to follow is, without predisposition one way or another, to gather what the testator means from what he says. What, I think, is often meant by tendency in this connexion is a series of cases from more or less the same period explaining or illustrating a general principle, or explaining or correcting cases from another period. But when every respect has been paid to such cases, which do not lay down that the one view is to be favoured more than the other, one has to come back to the will before the Court, and find out its meaning from its language. Nor am I impressed by what is said on both sides as to the naturalness or otherwise of the will according to the construction argued for. Apart from the obvious danger of construing the will on such a basis—which might be very wide of the mark if the truth were known—I think the will would be natural enough whichever way I construe it.

Disregarding all these matters, and confining myself to the language of the will, I have come to the clear conclusion that the widow is a trustee for herself and her children. The words "to have and manage same to the best advantage to herself and her five children" seem to me indistinguishable in their sense from "to have and to hold same for the benefit of herself and her five children." Further, the fact that she herself is named in what I may call the habendum clause is a strong corroboration of this view.

Solicitor for the plaintiffs: *Joseph M. Reilly.*

Solicitors for the defendant Mrs. Campbell: *Hunter & Burland.*

Solicitor for the defendant William Campbell: *John H. M'Cann.*

R. W. L.

GRUNDY *v.* BROADBENT.

(1917. No. 309.)

O'Connor J., 1918. July 1.

Assignment—Chose in action—Notice—Right to sue—Equitable assignment—Judicature Act (Ireland), 1877 (40 & 41 *Vict. c.* 57), *s.* 28, *sub-s.* 6—*Trading with the Enemy Amendment Act*, 1914 (5 *Geo.* 5, *c.* 12), *s.* 6.

An Austrian firm was indebted to a London firm in the sum of £3101 at the commencement of the war between Great Britain and Austria. On September 25th, 1914, the Austrian firm wrote a letter purporting to be an assignment to the London firm of a debt of £518 due to them by B., the deceased, whose estate was being administered. That letter contained an enclosure signed by the Austrian firm addressed to B., amounting to a notice of assignment of the debt. That enclosure was kept by the London firm till the following December, when they forwarded it to B.

Held, that as the transaction of 25th September, 1914, amounted to a valid equitable assignment of a chose in action for valuable consideration, it was not illegal as contravening section 6 of the Trading with the Enemy Amendment Act, 1914 (5 Geo. 5, c. 12), and that the fact that the London firm had no right to sue in their own name till December did not prevent them from proving against the estate of B. for the debt due by him to the Austrian firm.

Section 28 of the Judicature Act, 1877, does not affect the right of an equitable assignee of a chose in action, but merely affects the procedure, enabling an assignee to sue in his own name at law.

APPLICATION on behalf of White, Child, & Beney (a firm carrying on business in London), pursuant to a memorandum lodged in Chambers, that the applicants might be declared entitled to prove against the estate of Samuel Broadbent, the deceased in the matter, in respect of a debt of £518 9*s.* 4*d.*, due by said deceased to Johann Faltis Erben (an Austrian firm), which said debt was alleged to have been assigned to the applicants on 25th September, 1914.

The facts of the case and the arguments are stated in the judgment.

H. Wilson K.C., for the applicants.

James Andrews K.C., for the plaintiffs.

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O'CONNOR J.:—

This is an application on behalf of Messrs. White, Child, & Beney, Ltd., of London, to rank as creditors against the estate of the late Mr. Samuel Broadbent for the sum of £518 9*s.* 4*d.*, formerly due by the deceased to one Johann Faltis Erben, a yarn merchant in Austria.

The facts are these:—The claimants had business dealings before the war with an Austrian firm, to whom they had delivered machinery goods to be used by that firm in their spinning business. In respect of such transactions the Austrian firm was indebted to the London firm at the commencement of the war in the sum of £3101. At the same time Mr. Broadbent, the deceased in this matter, was indebted to the Austrian firm in respect of yarn delivered by them to him. The claimants rely on a letter from the Austrian firm to the London firm, dated the 25th September, 1914, as constituting an assignment to the London firm of a debt due by Broadbent to the Austrian firm amounting to £518 9*s.* 4*d.*, and they claim to rank against his estate for that sum. That letter contained an enclosure, also signed by the Austrian firm, addressed to Broadbent, and relied on as constituting notice of the assignment of the debt. This letter, however, was kept by the claimants until December, when they forwarded it to Broadbent.

Mr. Andrews makes three points against the claim—1, that the documents do not constitute an assignment of the debt, but merely a notice of an intention to assign the debt; 2, that there is no sufficient evidence of the existence of a debt to the Austrian firm at the date of the alleged assignment; 3, that if the other points are decided against him, the assignment is illegal, as contravening sect. 6 of the Trading with the Enemy Amendment Act, 1914. [His Lordship having referred to the documents and the affidavits in support of the claim, and holding in favour of the claimants on the first two points, dealt with the third point.] Mr. Andrews' third point arises on the proviso to sect. 6 of the Trading with the Enemy Amendment Act, 1914, which is as follows:—

"Provided that this sub-section shall not apply where the person to whom the assignment, delivery, or transfer was made, or some person deriving title under him, proves that the

transfer, delivery, or assignment, or some subsequent transfer, delivery, or assignment, was made before the 19th of November, 1914, in good faith and for valuable consideration, nor shall this sub-section apply to any bill of exchange or promissory note."

The argument turns on the date of the assignment. It is contended that it must be taken to be the month of December, when notice of it was served on Broadbent. I cannot agree. The letter of the 25th September, 1914, constituted a valid equitable assignment of the debt for valuable consideration. It was, as between the parties, an irrevocable transaction, and if, subsequent to its date, the Austrian firm could recover, and did recover, its amount from the debtor, they would have held such amount as trustees for Messrs. White, Child, & Beney, Ltd.

Mr. Andrews relies on sect. 28 of the Judicature Act, 1877. But that section does not touch equitable assignments of a chose in action; it merely deals with the procedure necessary to enable an assignee to sue in his own name at law; the rights of an equitable assignee to sue by joining the assignor in the action as plaintiff or defendant remain unaffected. The transaction of the 25th September amounted to an assignment valid in equity; it was subsequently, by service of the notice, turned into an assignment giving the claimants a perfect title to sue at law in their own names. But the fact that the title to sue in their own names did not accrue to the claimants till December makes no difference in my opinion. The date of assignment is the date it bears, and none other, and, accordingly, I hold that the claim must be admitted.

Solicitors for the applicants: *Carson & M'Dowell.*

Solicitors for the plaintiffs: *Shean & Dickson.*

R. W. L.

Appeal.
1918.
June 18.

BERMINGHAM *v.* BERMINGHAM AND OTHERS (1).

Administration—Statutes of Limitation—Chattel real—Next-of-kin of intestate out of possession for more than twelve years, but less than twenty years next before administration decree—(23 *&* 24 *Vict. c.* 38), *s.* 13—*Real Property Limitation Act*, 1874 (37 *&* 38 *Vict. c.* 57), *s.* 1.

P. B. died intestate on 8th August, 1901, leaving a widow and seven children him surviving. A grant of administration to him was taken out by the widow in the following year. The assets of the deceased consisted of a house and lands of chattel real tenure. The widow and five of the children remained in possession of these from the date of the intestate's death. L. B. and M. B., two other children of the intestate, had left the home, and had been out of possession for more than twelve years, but less than twenty prior to 1916. One of the five children issued an equity civil bill for administration on the 22nd May, 1916, and the usual primary decree was made on the 28th October, 1916. Notice of this decree was duly served on all the parties interested, including L. B. and M. B.

The Clerk of the Crown and Peace, by his certificate, found that the persons entitled were the widow and five children in possession, but that the title of the remaining two was statute-barred. The certificate was duly confirmed. A claim to have it varied by admitting L. B. and M. B. as next-of-kin was disallowed by the County Court Judge of Westmeath.

Madden J., at the Spring Assizes, 1917, sitting to hear appeals from the County Court Judge, stated a case for the Court of Appeal under section 8 of the County Court Appeals (Ireland) Act, 1889, upon the question whether L. B. and M. B. in the above circumstances were entitled to a distributive share of the chattels real.

Held, that L. B. and M. B. were so entitled, that the certificate should be amended accordingly, inasmuch as the administratrix held the outstanding personal estate in trust for all those entitled, and not merely for those in possession.

CASE STATED under County Court Appeals (Ireland) Act, 1889, sect. 8, by Madden J. at the Spring Assizes, 1917, sitting to hear appeals from the County Court Judge of Westmeath.

The following are the material portions of the case stated:—

1. Patrick Bermingham, deceased in this matter, died intestate on the 18th day of August, 1901. Letters of administration

(1) In the Court of Appeal, before O'CONNOR M.R., and RONAN and MOLONY L.JJ.

were granted to Ellen Bermingham, his widow, on the 10th day of September, 1902.

2. An equity civil bill was issued for the administration of the estate of Patrick Bermingham, deceased, and a primary decree was made thereon on the 28th October, 1916. Notice of the decree was served on all parties interested, including the appellants, Lena Balfe, married woman, wife of Edward Balfe of Glynwood, in the county of Westmeath, and Michael Bermingham of 2619 K Alleghany Avenue, Philadelphia, United States of America, lawful children of the said deceased, in March, 1917, but save as hereinafter stated they did not appear in any of the subsequent proceedings.

3. The certificate of the Clerk of the Crown and Peace is dated the 7th day of June, 1917, and same was duly confirmed by an Order of the Court, dated the 16th day of June, 1917. Said certificate finds in paragraph 1 thereof that the next-of-kin of the said deceased, according to the statute of distributions, of the said Patrick Bermingham, deceased, living at the time of his death were:—Ellen Bermingham, deceased's widow (defendant); Michael Bermingham, son; Margaret Bermingham, daughter; Lena Balfe, daughter; Mary Bermingham, daughter (plaintiff); Elizabeth Bermingham, daughter (defendant); Francis Bermingham, son (defendant); Edward Bermingham, son (defendant). Said certificate also found that all the said next-of-kin were still living.

4. It was also found that the said Ellen Bermingham, as administratrix aforesaid, had received personal estate to the amount of £161 15*s.* 1*d.*, and that she had paid, or was entitled to be allowed on account thereof, sums to the amount of £168 16*s.* 10*d.*, and that there was no debt of the intestate remaining unpaid; and that the funeral expenses had also been paid; and that the outstanding or undisposed of personal estate consisted of:—1. House and garden at Creggan held from Mr. Longworth at the yearly rent of £1. 2. Cutaway at Kilmacuagh held from Mr. Longworth at 5*s.* rent. 3. Cutaway bog gardens at Kilmacuagh held from Mr. William English at 10*s.* yearly. 4. Small farm at Kilmacuagh held from Mr. William English at £5 (now reduced to £2 15*s.*).

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5. By paragraph 6 of the said certificate it was further found that "the following persons (being those of the next-of-kin of the said Patrick Bermingham whose titles have not become statute-barred) are now entitled to the lands of Kilmacuagh in the following shares and proportions:—Ellen Bermingham, widow, three-eighths; Margaret Bermingham, one-eighth; Mary Bermingham, one-eighth; Elizabeth Bermingham, one-eighth; Francis Bermingham, one-eighth; Edward Bermingham, one-eighth.

6. By the said order of the 16th June, 1917, it was declared that the farm of Clonboney referred to in paragraph 5 of the equity civil bill was and is part of the assets of the said deceased, and, to that extent, the said certificate be and the same was accordingly amended, but in all other respects the said certificate was thereby confirmed. The said Lena Balfe was examined before the County Court Judge on the making of this Order.

7. The said administratrix, and the said next-of-kin mentioned in paragraph 6 of the certificate all resided on one portion of the chattels real, namely, the house and garden at Creggan held from Mr. Longworth at the yearly rent of £1; and continued in possession of all the said lands from the date of the death of the said Patrick Bermingham.

8. A notice of motion, bearing date the 17th October, 1917, was served on behalf of the said Lena Balfe and Michael Bermingham, seeking that the order of the Court of the 16th day of June, 1917, be varied by having the said lawful children of the said deceased admitted as next-of-kin of the said deceased, and as such entitled to his estate; and by order of the County Court Judge, dated the 12th November, 1917, it was declared that the said claim be disallowed.

9. From an affidavit of the said Lena Balfe, dated the 16th October, 1917, it appeared, and was also admitted, that the said Lena Balfe and Michael Bermingham had continued out of possession of the said lands for a period of over twelve years prior to the issue of the equity civil bill herein.

10. A notice of appeal, dated the 17th November, 1917, was served against so much of the order made on the 12th November, 1917, as refused to vary the certificate of the Clerk of the Crown

and Peace made in the matter, by having the said Lena Balfe and Michael Bermingham admitted as next-of-kin of the said deceased, and entitled to a share of his estate.

11. Mr. Wylie K.C., on behalf of the said Lena Balfe and Michael Bermingham, contended before me that, inasmuch as Ellen Bermingham had taken out letters of administration to the said deceased on the 10th September, 1902, and had remained in possession as such administratrix, and, further, as the certificate of the Clerk of the Crown and Peace, confirmed by the County Court Judge, found that the chattels real in paragraph 4 hereof were outstanding personal estate of the said deceased, that his clients, by virtue of the operation of the Law of Property Act, 1860, sect. 13, were not barred by the Statute of Limitations against the entire lands, or, alternatively, against the administratrix, and were entitled to distributive shares of the said personal estate of the said deceased, as so found; and that the certificate of the Clerk of the Crown and Peace should be varied accordingly. Mr. Murphy K.C., on behalf of the plaintiff, contended that as the assets of the deceased consisted solely of land, which lands had been in the possession of the next-of-kin other than the said Lena Balfe and Michael Bermingham for twelve years and upwards, the claims of the said Lena Balfe and Michael Bermingham were barred by the Real Property Limitation Act of 1874, and that the certificate of the Clerk of the Crown and Peace should not be amended. Mr. Wood appeared for the defendant administratrix.

12. As the question raised seemed to me not to be covered by any direct decision, on the request of Mr. Wylie K.C. I consented to state a case. The question for the decision of the Court is:—"Are Lena Balfe and Michael Bermingham in the above circumstances entitled as lawful children of the said deceased to a distributive share of the chattels real mentioned in paragraph 4 of the said certificate of the Clerk of the Crown and Peace, and if so the said certificate should be amended accordingly?"

Wylie K.C. (*Wood* with him), for Lena Balfe and Michael Bermingham, the appellants.

Babington K.C. (*Farrell* with him), for the plaintiff and respondent.

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The arguments appear sufficiently from the case stated. The following authorities were cited and discussed:—*Hoey* v. *Hoey* (1); *Duffy* v. *Duffy* (2); *Cooper* v. *Cooper* (3); Halsbury's Laws of England, vol. xiv, pp. 217, 218.

O'CONNOR M.R.:—

We do not think it necessary to call on Mr. Wylie to reply. It appears to me that this is really a simple case. The plaintiff as next-of-kin brought a suit in the County Court for the administration of the estate of her deceased father, and she named as defendants her mother, Ellen Bermingham, who was the administratrix of the deceased, and three others of the next of-kin, children of the deceased. The civil bill states that "Letters of administration of the personal estate of the said Patrick Bermingham were granted to the defendant, Ellen Bermingham, on the 19th day of September, 1902, but the said defendant has not administered the estate, and the plaintiff has not received her distributive share, or any part thereof."

The only meaning of that is that the defendant as administratrix took possession, and gave nothing to the plaintiff. The civil bill goes on: "Of the said children, Lena was married prior to the death of the said Patrick Bermingham, and has not returned home since her marriage or asserted any claim to any part of her father's estate. The said Michael went to America prior to the death of his father, and, except for a short visit, has not returned, and has not asserted any claim to any part of his father's estate. The said Annie was married prior to her father's death and received her portion on such marriage, and has not asserted any claim to any part of her father's estate. The said Margaret left her father's farm about five years ago and set up business for herself, and the plaintiff charges and believes that she received her portion or distributive share before leaving. The defendants and the plaintiff (save for two periods of absence) have continued to live on in their father's farm." It then alleges that the deceased died possessed of two holdings at Kilnaveagh in the division and county aforesaid, containing 8 acres 1 rood and 15 perches statute measure or

(1) 31 I. L. T. R. 11.
(2) [1906] 1 I. R. 205.
(3) L. R. 7 H. L. 53.

thereabouts, held as a yearly tenancy, and was also possessed of a shop, offices, and land at Creggan aforesaid, containing 1 rood and 10 perches, and held as a yearly tenancy, and of stock-in-trade, farming stock, furniture and effects. "About twelve years ago the defendant, Ellen Bermingham, purchased a farm of land at Clonboney, containing 8 acres 3 roods and 4 perches statute measure or thereabouts and held in fee-simple, subject to an annuity payable to the Irish Land Commission. The said farm was purchased out of the assets of the said Patrick Bermingham, and was purchased by the defendant, Ellen Bermingham, as trustee for the next-of-kin of the said Patrick Bermingham." Then it is alleged that a sale of the lands will be more beneficial to the parties interested therein than a division of the same.

The plaintiff then seeks as relief that the personal estate may be administered under the direction of the Court, an inquiry as to the persons entitled, a sale of the lands in lieu of partition, and the usual accounts and inquiries.

No defence was put in to that, and the usual decree in an administration suit was pronounced that inquiries and accounts be made and taken as to who were the next-of-kin living at the time of the death of Patrick Bermingham, an account of the personal estate of the intestate come to the hands of the defendant, Ellen Bermingham, the administratrix, an account of the debts and expenses, and an inquiry as to what parts, if any, of the intestate's personal estate are outstanding and undisposed of, and an inquiry as to what persons are entitled to the lands of Kilmacuagh; and it is ordered that the intestate's personal estate be applied in payment of the intestate's debts and funeral expenses in the due course of administration.

Under that order an inquiry was held by the Clerk of the Crown and Peace, and the result of that inquiry is contained in his certificate of the 7th June, 1917. He finds that the next-of-kin are seven children in addition to Ellen the widow, and he gives the names. He finds that the defendant Ellen, the administratrix, has received personal estate to the amount of £161 15*s.* 1*d.*, and that she has paid sums to the amount of £168 16*s.* 10*d.*, leaving a balance due to her of £7 1*s.* 9*d.* on that account. He also finds that there is not any debt of the said intestate remaining

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unpaid, and that the funeral expenses have been paid. He further finds that the personal estate of the said intestate outstanding or undisposed of consists of the particulars set forth in the first schedule, and that schedule contains the lands of Kilmacuagh. It does not include the farm at Clonboney which, as is alleged, was purchased out of the assets of the deceased. But there was a motion afterwards to have it declared that this farm was in addition portion of the personal estate, and an order was made on the 16th June, 1917, in the following terms:—"The Court doth declare that the said farm was and is part of the estate of the said deceased, and doth order that to that extent the said certificate be, and the same is accordingly hereby amended, but that in all other respects the same be, and it is accordingly hereby confirmed"; and then an order was made for the sale of the farm.

Now, taking the certificate of the Clerk of the Crown and Peace as amended by that order, what do we find? We find that a certain number of persons are next-of-kin. We find that all the estate was administered except certain lands found to be outstanding personal estate. Once you have the finding as to who the next-of-kin are, and what the outstanding estate is, it follows that after the payment of the debts, &c., the residue of the outstanding estate is held by the administratrix in trust for the next-of-kin, and the usual course is for the administratrix to realize the personal estate and divide the residue. But there is also this finding in the certificate:—"The following persons (being those of the next-of-kin of the said Patrick Bermingham, whose titles have not become statute-barred) are now entitled to the lands of Kilmacuagh in the following shares and proportions, and it sets out the names of Ellen, the widow, and the five children in possession. That finding is entirely inconsistent with the previous finding, that the next-of-kin consisted of seven persons, and that there was outstanding personal estate which had not been administered, which consisted of the lands of Kilmacuagh. In support of the latter finding, the case is made that two of those next-of-kin had left this country, and that any title they had was lost by virtue of the Statute of Limitations. Who raises this point? Why, the plaintiff, who, according to her own equity civil bill, was never in possession of the lands and never touched

any of the assets. I think the only person who could raise the point under the statute is a person who relies on possession; but here it is a person who was never in possession according to her own case. If there was anything whatever in this point as against these parties in America, the only person who could raise it would be the personal representative, because she was the person in possession. The point was not made by the personal representative. On the contrary, the personal representative was one of the parties present when the accounts and inquiries were taken and the Clerk of the Crown and Peace's certificate made up. I find that on the face of the record. The defendant Ellen does not make the point that she has acquired a title under the Statute of Limitations, and she is the only person entitled to do so. If she did make the case detrimental to the title of the next-of-kin, her proper course would have been to have contended before the Clerk of the Crown and Peace that the shares of the absent parties had ceased to be theirs, and had become her absolute property. I hold that it is not open to the plaintiff to raise the question.

The questions put by Madden J. must be answered as follows: Lena Balfe and Michael Bermingham are entitled to a distributive share of the chattels real mentioned in paragraph 4 of the certificate of the Clerk of the Crown and Peace, and the said certificate should be amended accordingly.

RONAN L.J.:—

I am of the same opinion. We are hearing this case under sect. 8 of the County Court Appeals (Ireland) Act, 1889, and that section provides that, notwithstanding the 43rd section of the County Officers and Courts (Ireland) Act, 1877, the Judge of Assize "may give special leave to appeal to the Court of Appeal on a question of law." In my opinion, the only matter upon which Mr. Justice Madden has given leave to appeal in respect of this case is the question of the Statute of Limitations.

He has not reserved any other question; and it is not competent for us to deal with any other question raised during the argument except the question reserved under the statute.

It is worthy of notice that of the six persons found by the Clerk of the Crown and Peace's certificate to be entitled five are

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actually parties to these proceedings, and the only one declared entitled who is not a party is Margaret, whom, it is alleged in the equity civil bill, has made no claim.

I do not think it necessary to add anything more.

MOLONY L.J.:—

I agree fully with the Master of the Rolls, and for the reasons he has stated.

I wish to say a few words as to the true construction of the statute discussed at the Bar. By sect. 13 of the 23 & 24 Vict. c. 38 a limitation is imposed of twenty years for the recovery of personal estate or any share of any person dying intestate from the legal personal representative.

There are two things which the person seeking to recover possession must satisfy himself about, and they are—first, is there a personal representative in existence? and, secondly, is that personal representative in possession of the personal estate of the intestate? In this case we have a personal representative in existence, and we have her in possession of the personal estate of the intestate; for it is found by the 7th paragraph of the Case Stated:—"The said administratrix and the said next-of-kin mentioned in paragraph 6 of the certificate all resided on one portion of the chattels real, viz., the house and garden at Creggan, held from Mr. Longworth at the yearly rent of £1, and continued in possession of all the said lands from the date of the death of the said Patrick Bermingham." Now, the only point which could be raised, and has been made in reference to that, is that she could not be said to be in possession of these lands when as a matter of fact five of the other next-of-kin were also in possession. But in such a case it is perfectly clear that the possession of the administratrix of the lands has reference to the legal title of such administratrix. In many cases—in the great majority of cases—there are next-of-kin in possession, but the title of the administrator is the paramount title under which the lands are held. I think the view of FitzGibbon L.J. in *Hoey* v. *Hoey* (1) is perfectly correct, and applicable to the present case. He says:—"Prima facie, the next-of-kin were in possession in respect of their

(1) 31 I. L. T. R. 11.

beneficial occupation. They remained on by virtue of their beneficial interest. It appears to me that if one of the next-of-kin within twelve years takes out administration, he is in possession as personal representative of the deceased."

That is what has happened here when, following the death of the intestate, the widow took out administration. Why did she take out administration? I think the answer of FitzGibbon L.J. quite correct: "From the day on which she took out letters of administration Bridget was personal representative of her husband in possession and occupation of the farm. There is no statute except Lord St. Leonard's Act which will bar a person after twenty years. At the moment of her death she was liable to an action of administration. She was trustee for those entitled, and not merely for those in possession. It is impossible that an administrator can be a trustee for such of the legatees as happen to be living with her, and not for the others. If I held that the widow was beneficial owner and had gained a title, it would be only a matter of administering her assets. In my opinion, it is as of right to give a decree for administration. A man cannot be thus shut out from a fair share of his father's property."

The administratrix has not died here, and there is no question of administering her assets.

I am quite clear that, in the present case, the administratrix who is named a defendant is a trustee for those entitled, and not merely for those in possession.

Solicitor for Lena Balfe and Michael Bermingham: *P. V. C. Murtagh.*

Solicitors for the plaintiff: *N. J. Downes & Co.*

Solicitors for the defendants: *W. P. Kelly & Walker.*

H. J. M'C.

Wylie J.
1918.
June 13, 20.

In the MATTER of the ESTATE of C. R. D. GUN CUNNINGHAM.

Land Purchase Acts—Bonus—Solvency of estate as to income—Arrears of interest on charge—Income of demesne lands—Irish Land Act, 1903 (3 *Ed.* 7, c. 37), *s.* 48, *sub-s.* 1.

In ascertaining whether an estate sold under the Land Purchase Acts is solvent as to income, within the meaning of the proviso to sect. 48, sub-s. 1, of the Irish Land Act, 1903, the rule is that, if on comparing the annual income which the vendor was entitled to receive with the annual outgoings which he was liable to pay at the date of sale, the former exceeds the latter, he is entitled to the bonus, notwithstanding the fact that there may be an accumulation of antecedent arrears of a charge.

In re Thompson's Estate ([1912] 1 I. R., p. 466, note), applied.

In calculating the income derived from the estate, the vendor is entitled to include as profit income the amount of the poor law valuation of demesne and other lands in hands.

Question arising on allocation as to whether the bonus should be paid to the vendor or be added to the purchase-money?

The vendor was tenant for life under a settlement of large estates situated in the county of Wicklow. Portion of the settled estates was sold to the tenants thereof under the Land Purchase Acts under agreements entered into in 1905, and on the allocation of the purchase-money it was held after argument, that the vendor was entitled to the bonus. Other portions of the settled estates were subsequently sold to the tenants thereof under agreements entered into in 1907, and the purchase-money had now been allocated.

The charges affecting the settled estates were:—1. A mortgage dated the 4th April, 1840, to secure £55,000 and interest at 5½ per cent., reducible to 4½ per cent. on punctual payment. The amount now due on foot of this mortgage was £36,768. Interest on the mortgage had for upwards of thirty years been regularly paid and accepted at 4 per cent. No interest was due at the date of the agreements for sale, and all prior sales had been paid within

the time limited by the mortgage, and receipts in full given for them. 2. Arrears of a jointure rent-charge of £1000 per annum created by a settlement dated the 23rd July, 1844. The amount of arrears due at the date of the agreements for sale was £1854. There was further due the sum of £446 17*s.* 6*d.* for unpaid instalments of estate duty, which became payable on the cesser of the jointure on the death of the jointress, which occurred on the 5th August, 1904. 3. A charge of £15,000 for younger children, created by the same settlement. The interest on this charge was largely in arrear, and at the date of the agreements for sale amounted to £13,256 6*s.*, representing twenty-seven years' arrears.

By indenture dated the 29th September, 1890, a receiver had been appointed to collect the rents, and apply the same in discharge of all outgoings, costs, expenses, and collection fees, and to pay the interest on the said charges and incumbrances, and the accruing gales of the jointure, and to pay the balance to the vendor.

The vendor, in support of his claim to the bonus, filed an affidavit setting out in detail the income and outgoings of the entire estates, and showing a surplus income of £706 2*s.* 10*d.* This surplus income was arrived at without making any provision for the accumulated arrears. Included in the income were four items, amounting to £791 1*s.*, representing the poor law valuation of the lands in hands for the year 1907, of which sum £589 15*s.* represented the poor law valuation of the mansion house and demesne lands. Among the outgoings, the interest on the mortgage of 1840 was calculated at 4 per cent.

The vendor debited himself with income-tax on the entire income of the estates, and set out the amount of the interest on the charges less income-tax.

Mr. C. L. Uniacke Townshend, as trustee of the term of years created for the purpose of securing the portions charge of £15,000, filed an affidavit by way of objection. He claimed that among the outgoings, the interest on the mortgage of 1840 should be calculated at the rate mentioned in the mortgage deed, and that the interest on the charges should be set out in gross and not less income-tax; and that having regard to the fact that large arrears were due on the portions charge, and that under the receiver deed the receiver

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was bound to pay all arrears of interest before making any payment to the vendor, and to the fact that the surplus income of £706 2*s.* 10*d.* was fictitious, and produced by a non-rent-producing source of income, the estate was not solvent as to income at the date of sale, and that the bonus should be added to the purchase-money.

Herbert Wilson K.C. and *Norman Keogh*, for the vendor.

Garrett Walker K.C., for C. L. Uniacke Townshend, in support of the objection.

June 20. WYLIE J. :—

The vendor is tenant for life under a settlement of large estates in the county of Wicklow. He sold part of the estates, which I shall call "estate No. 1," to the tenants in 1905. The sale was sanctioned by the Estates Commissioners in due course, and the purchase-money was advanced and distributed in June, 1910. On the allocation the question was raised whether the vendor was entitled to the bonus? After argument by counsel on both sides, I decided that he was so entitled, and no appeal was taken. In July, 1907, the vendor sold another portion of the estates, which I shall call "estate No. 2." The sale has been sanctioned, the purchase-money advanced and distributed, and on allocation the same question is now raised as to the bonus in respect of estate No. 2. The persons now opposing the vendor's claim are not the same as on the former occasion, though they are in the same interest; but, from the nature of the question and the change of circumstances affecting it, which took place during the period between the two sales, the former decision cannot be an estoppel, and the persons who now raise the question are fully entitled to a fresh and independent decision as regards the present bonus. At the same time, if the facts on which the question turns are substantially the same now as on the former occasion, and if the law has not been changed since my former decision, I would of course now follow it.

Now let us first see how the two cases compare as to facts. Estate No. 1 and estate No. 2, together with the other lands

comprised in the settlement, are subject to common charges and other common outgoings. This being the case, in considering the question whether estate No. 1 was at the date of sale solvent as to income, one or other of two courses might have been adopted—1, the income of estate No. 1 could have been separately ascertained, and the interest on the common charges and other common outgoings apportioned between estate No. 1 and the other lands liable thereto, and such income and such apportioned part of interest and outgoings then compared; or 2, the income of the entire estates could have been compared with the amount of the entire annual interest and outgoings. The result should be the same in both cases, and if the income exceeds the outgoings the estate is solvent as to income. The second and simpler method is the one usually adopted, and was the one followed in these cases.

With regard to estate No. 1, which was sold in 1905, the vendor in support of his claim to the bonus filed an affidavit on the 20th June, 1910, in which he set out in detail the income and outgoings of the entire estates, and showed a surplus income of £809 19*s.* 2*d.*, as existing in 1905, the date of sale. An affidavit in reply was filed on behalf of an incumbrancer on some of the portions charges, opposing the vendor's claim. This affidavit did not challenge the accuracy of any of the detailed items in the vendor's affidavit, but raised some points of criticism of a rather absurd kind. It stated by way of objection that the vendor included in the income of the estate two sums of £589 15*s.* and £36 10*s.*, being the government valuation of the mansion house, demesne, and other lands in his possession, but allowed nothing for management and upkeep. Who ever heard of anyone deducting from the government valuation of land the expenses of management and upkeep in order to arrive at the profit income derived from it. Why, the government valuation is supposed to be the profit income, and it is on it that income-tax is paid; and as a matter of fact it is generally much below the real profit income after deducting all working expenses. Objection was also taken to the item of interest on the £55,000 charge being put down at 4 per cent., instead of 4½ or 5½ payable under the mortgage. A further objection was taken on the ground that a receiver had

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been appointed over the estates who was bound to pay out of the rents and profits all outgoings, including arrears, before paying any balance to the vendor, and that, as large arrears were due at the date of sale, which it would take many years of the surplus income to discharge, the vendor could not within any reasonable time be entitled to receive any part of the rents and profits. In that state of facts I held, notwithstanding the objections made, that estate No. 1 was solvent as to income, and that the vendor was entitled to the bonus, and as I have said that decision was not appealed against.

With regard to estate No. 2 now before me, which was sold in July, 1907, two years after the previous sale, the vendor has made a similar affidavit in support of his claim to the bonus; and the only substantial difference between this and the former affidavit is, the reduction of the gross income from £5897 6*s.* 3*d.* to £5778 1*s.* 11*d.*, arising from the fact that for the old rental of estate No 1 there was substituted the interest payable in lieu of rent after the date of sale, and that £147 15*s.* 0*d.*, the government valuation of Patterson's holding, which meanwhile had become vacant, was substituted for the former rent of £229 11*s.* 6*d.*, and the affidavit shows a surplus income of £706 2*s.* 10*d.*, instead of £809 19*s.* 2*d.* in the former affidavit. This surplus is arrived at after providing for the payment of all the annual outgoings, including the annual interest on the portions charges of £15,000, but makes no provision for payment of accumulated arrears. In opposition to the vendor's claim, an exactly similar affidavit to that made in the former case is filed on behalf of the trustee of the portions charges, raising the same points that were raised in the former affidavit, and making the further point that untenanted lands in the vendor's hands, no matter how valuable they may be, are to be treated as producing no income, because they are not rent-producing—a contention too absurd to require comment. An owner is assessed for income tax on the valuation, and, if he cannot get an equal profit income from the land, he is not likely nor is he bound to pay the tax on the valuation. Besides, if in order to ascertain whether estate No. 2 is solvent as to income we adopted the first method referred to, we would have to apportion upon the lands in hands, according to their valuation, their proper proportion

of the common outgoings. It seems to me therefore that, on the facts of this case as they existed on the date of sale, I must arrive at the same conclusion as in the case of estate No. 1, unless I am prepared to reverse my decision in that case, and also in *In re Bandon's Estate* (1). I asked Mr. Walker whether the law had been altered by any decision since June, 1910, and he appeared to think it had been, and referred me to *In re Thompson's Estate* (2), decided in June, 1912, by the Court of Appeal, and to *In re Nugent's Estate* (3). As regards the latter case, I will only make one observation similar to that made by Ross J. regarding *In re Bandon's Estate* (1), viz., that if I find a case like *In re Nugent's Estate* (3) in its essentials, I will follow that decision, unless I am precluded by the decision of the Court of Appeal in *In re Thompson's Estate* (2).

As regards *In re Thompson's Estate* (2), the only official report of that decision is contained in the short note referred to, from which very little light or leading can be obtained. But the Registrar of the Court of Appeal has been good enough to furnish me with a copy of the judgments in that case as taken down by himself. They were, I am sure, taken with his usual accuracy; but they are very short, and leave much to be desired. The Lord Chancellor's judgment is rather difficult to follow, but he seems to have decided the case on a capital point, which he says was not discussed before me in this Court. As far as I can gather, the capital point was that interest on the charges should have been calculated at 5½ per cent., the penal rate, the interest being unpaid and the days of grace having expired at the date of sale, so that the liability for the penal rate then existed, and calculated at this rate the income for that year was less than the outgoings. The judgment of Holmes L.J. as reported is far from clear. He says: "We are called on to say whether 'the estate was so incumbered,' &c., i.e., whether the rents and profits were less than the interest on the incumbrances." Further on he says:—"Taking the income, I find £1978 16*s.* 10*d.* would be the amount receivable by her, but over £2300 would be the amount to be paid for interest on the incumbrances; therefore that leaves nothing to receive for

(1) [1907] 1 I. R. 226. (2) Unreported. See note, [1912] 1 I. R., at p. 466.
(3) [1912] 1 I. R. 488.

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her own use, and therefore on that basis the proviso applies." Therefore both the Lord Chancellor and Holmes L.J. decided the question of solvency of income within the meaning of the proviso by comparing the annual income with the annual outgoings at the date of sale, and neither makes any reference to accumulated arrears. The judgment of Cherry L.J. is a little more specific. He says:—"To a certain extent I agree with Mr. Walker, that in estimating solvency under the second clause you must compare the income of one year with the expenditure of one year; and I don't agree with Mr. Jellett that accumulated arrears of interest should debar the vendor from receiving the bonus. You must compare legal rights with legal liabilities. Taking this year, the legal right would be the full amount of rents receivable, and the legal liabilities the full amount of interest payable on the mortgages; and as it is admitted the year's interest was not paid at the contract date, and must therefore be taken at 5½ per cent., deducting the latter, the estate would be insolvent in that year." It seems to me, therefore, that the Court of Appeal in this case lays down the rule that to ascertain whether an estate is solvent as to income so as to entitle a vendor, tenant for life, to the bonus, you have simply to compare the annual income which the vendor was entitled to receive with the annual outgoings which he was liable to pay at the date of the sale, and if the income exceeds the outgoings, he is entitled to the bonus, notwithstanding the fact that there may be an accumulation of antecedent arrears. It follows, therefore, that in this case, if the account set forth in the affidavit, showing a surplus income of £706 2*s.* 10*d.*, is correctly made out, the vendor is entitled to the bonus.

But Mr. Walker has made two objections. First, he says the interest on the £55,000 charge should be calculated at 5½ per cent. instead of 4 per cent., as in the affidavit, and if so calculated, the income would be less than the outgoings, and this would be so; but there was in this case no interest due on this charge at date of sale, and all the prior gales were paid within the days of grace, and receipts in full given for them, so that no liability for 5½ per cent. ever existed. Besides, the interest on this charge has for thirty years been regularly paid and accepted at 4 per cent., and on the allocation in both estates that is the amount of interest claimed and

paid. The second point was that the interest on the charges should be put down in gross, and not less income tax. If the vendor had done that he would have been charging himself twice. He has already debited himself with the income tax on the entire income of the estate, and, for the purpose of assessment, he is, of course, entitled to deduct from the income the interest on the charges.

In my opinion, therefore, a large surplus income is correctly shown, and the vendor is entitled to the bonus.

Solicitors for the vendor: *Rooke & Rooke.*

Solicitors for C. L. Uniacke Townshend: *Stephen Gordon & Son.*

J. E. W.

KEATING *v.* KEATING.

Practice—Sale by the Court—Person appointed to convey—Order by the High Court—Lunacy Jurisdiction—Trustee Act, 1893 (56 & 57 *Vict. c.* 53), *sects.* 30, 31, 33.

Where, in a partition action, the Court has sold lands, the property of a person of unsound mind not so found, a judge of the Chancery Division exercising the jurisdiction conferred by sections 30, 31, and 33 of the Trustee Act, 1893, will appoint a person to convey the lands on behalf of the person of unsound mind.

MOTION IN ACTION.

The action was brought for the partition or sale in lieu of partition of certain lands, one-fourth share of which was vested in the defendant, a person of unsound mind not so found. An order was made in the action for the sale of the lands in lieu of partition. The plaintiff now applied ex parte for an order under sections 30, 31, and 33 of the Trustee Act, 1893, appointing a person to convey.

Overend, for the plaintiff:—

The practice since 1850 has been for the High Court to make an order giving liberty to apply to the Lord Chancellor to make an order appointing a person to convey on behalf of the person of

O'Connor J. 1918.

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unsound mind or for a vesting order. That practice was continued after 1893, owing to the exception contained in the third column of the schedule to the Trustee Act of 1893. That exception was intended to preserve to the Lord Chancellor the powers conferred on him by the Act of 1850, but in no way to limit the powers given to the High Court by the Act of 1893. The High Court has, since the Act of 1893, concurrent jurisdiction with the Lord Chancellor. The order sought is in accordance with the English practice: Seton on Decrees, 7th ed., p. 1221.

O'CONNOR J.:—

My opinion is clear that there is jurisdiction in this Court to make the order asked for. Further, I think the Court should exercise the jurisdiction in cases like the present, where the purpose of the order is merely to apply the necessary machinery for the carrying out of judgments or orders of this Court. It would be, in my opinion, a hardship upon the parties to put them to the expense, in what is merely a formal matter, of an application to the Lord Chancellor. The practice now indicated by me is that which I think should be followed in future.

Solicitors for the plaintiff: *Brown & M'Cann.*

D. M. S.

DANIEL O'CONNELL MILEY AND VALENTINE MILEY *v.* HIS MAJESTY'S ATTORNEY-GENERAL FOR IRELAND AND MARY TERESA ROONEY (1).

Appeal.
1918.
Feb. 15, 18. 25.

Charity—Gift to—Charitable purpose not specifically impressed—Bequest to College of Surgeons—Objects of College—Legacy payable out of realty (7 & 8 *Vict. c.* 97), *s.* 16.

A testatrix devised and bequeathed all her property to her trustees upon trust for sale, and for the payment of legacies, including a legacy of £500 "to the Royal College of Surgeons in Ireland." The testatrix died four days after the execution of her will, leaving real and personal estate.

Held (affirming the judgment of Barton J.), that as the College of Surgeons was incorporated with two main objects, namely, the promotion of the science of surgery, and the promotion of the interests of those practising the profession of surgery, the latter not being a charitable object, and as the testatrix did not specifically impress her gift with a charitable purpose, the bequest was not one for charitable uses within the meaning of 7 & 8 Vict. c. 97, s. 16, and was accordingly not void though in part payable out of realty.

APPEAL.

By her will, dated the 29th March, 1917, Anna Maria Read devised and bequeathed all her property of every kind to the plaintiffs, whom she appointed her trustees and executors, upon trust to sell the same (save as therein mentioned), and out of the proceeds to pay certain legacies, including "To the Royal College of Surgeons in Ireland £500." The testatrix died on the 4th of April, 1917, her property consisting of real estate valued at £5800, and personal estate valued at £417. The present summons was brought by the plaintiffs as executors and trustees of the will for the determination of a number of matters arising under the will, including the question "whether the bequest of £500 to the College of Surgeons in Ireland is a charitable bequest."

Mr. Justice Barton having answered this question in the negative, the present appeal was brought by the defendant, Mary

(1) In the Court of Appeal, before SIR IGNATIUS J. O'BRIEN C., and RONAN and MOLONY L.JJ.

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Teresa Rooney, the residuary legatee and devisee named in the will.

The only evidence before the Court as to the nature and constitution of the College of Surgeons consisted of the Calendar of the college (1), containing the charters of Geo. 3 (1784), Geo. 4 (1828), Victoria (1844, 1883, and 1885), and the bye-laws of the college. It is sufficient to state here that the Court was of opinion that the charters demonstrated that the college was incorporated not only for the promotion of the science of surgery, but also for the discipline and benefit of the members of the profession themselves.

FitzGibbon K.C. and *O'Byrne*, for the appellant:—

We contend that this should be held a charitable bequest, and as the testatrix died within three months from the date of the will, the bequest fails so far as payable out of the realty.

Barton J. has placed too much reliance on *In re Royal College of Surgeons in England* (2), where it was held that the college was not entitled to exemption from the duty imposed by sect. 11 of the Customs and Inland Revenue Act, 1885. That case, however, turned upon the words of the exempting clause contained in that Act, and the decision in no way rules the present case. The judgment of Lord Herschell in *Commissioner of Inland Revenue* v. *Scott, In re Botham Ward Strays, York* (3), establishes that the words "charitable purposes" in the Act of 1885 are not used in a wide sense, but bear a strictly limited meaning; and *Commissioners of Income Tax* v. *Pemsel* (4) was distinguished. It is said that the college pays rates on their premises, but that is immaterial to the present question. In *O'Neill* v. *Commissioner of Valuation* (5), Palles C.B., referring to the three different classes of exempted hereditaments under 17 Vict. c. 8, s. 2, said—"The mere enumeration of these three different classes tends to show that 'charitable purposes' cannot be read in its general or unrestricted sense as used in the English statute of Elizabeth and the Irish statute of Charles."

(1) Printed at the University Press, Dublin, 1911.
(2) [1899] 1 Q. B. 871.
(3) [1892] 2 Q. B. 152.
(4) [1891] A. C. 531.
(5) [1914] 2 I. R. 447, at p. 464.

Again, at p. 469 he says—"It is impossible to hold that 'charitable' in this section is used in the general sense in which it was read by the Courts when determining whether gifts were void as violating the law against perpetuities." The wide construction placed by the Courts upon the words "charitable uses" in 7 & 8 Vict. c. 97, s. 16, is shown by the authorities collected in this case. In *Smith* v. *Kerr* (1) it was held that property granted to the Society of Clifford's Inn "for the good of the gentlemen of the Society and for the benefit of the Commonwealth" was held upon trust for charitable purposes, inasmuch as one of the functions fulfilled by an Inn of Chancery was the maintenance of schools of learning. The maintenance of such schools is also one of the main functions of the College of Surgeons in Ireland. The charters of the college show clearly that it was incorporated with a view to promoting the welfare of mankind by making due provision for "a sufficient number of properly educated surgeons, as well for the service of the public in general as for that of our army and navy." A bequest to such an institution must be charitable in its nature; and it is not open to the college to say that this result is avoided by their devoting the money to some purpose other than a charitable one.

Jellett K.C. and *Morgan Byrne*, for the College of Surgeons:—

This is a simple bequest of £500 to the college, which is not impressed with any charitable object, and the bequest cannot be said to come within the words of sect. 16 unless the college itself is so constituted as to render the bequest to it necessarily one of a charitable nature. There is no trust or contract affecting the bequest, and no one can be heard to discuss the probable uses to which the legacy will be put: see judgment of Lord Dunedin in *Bowman* v. *Secular Society, Ltd.* (2). The college, "being capable of acquiring property by gift, takes what has been given to it . . . as absolute beneficial owner": see judgment of Lord Parker in *Bowman's Case* (3); *Attorney-General* v. *Haberdashers' Company* (4). In *Smith* v. *Kerr* (1) the deed itself declared the trusts. If the Court is entitled to look to the objects for which

(1) [1900] 2 Ch. 511; [1902] 1 Ch. 774.
(2) [1917] A. C. 406, at p. 435.
(3) [1917] A. C. 406, at p. 441.
(4) 1 My. & K. 420.

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the college was incorporated, it is clear that these objects include many which it is impossible to consider as charitable, including the due discipline of members of the profession, and the advancement of their interests. This distinction was clearly recognized in *In re Royal College of Surgeons in England* (1): see judgment of Romer L.J. at pp. 877-883.

This legacy cannot be said to be in any way appropriated to the objects which might be considered charitable. That certain of the main objects of the corporation are for the benefit of mankind is immaterial. The same might be said of almost every institution; e.g., the Society of the King's Inns, or the Incorporated Law Society, which might equally as well be termed charitable associations.

FitzGibbon K.C., in reply.

Devitt, for the Attorney-General.

H. Hamilton, for the executors of the will.

[The following authorities were also referred to:—*Clancy, Appellant*; *Commissioner of Valuation, Respondent* (2); *Attorney-General* v. *Bagot* (3); *Incorporated Society* v. *Richards* (4); *Sutton's Hospital Case* (5).]

Cur. adv. vult.

SIR IGNATIUS J. O'BRIEN C.:—

The question raised in this case has come before the Court in a very unsatisfactory way. When recourse is had to the provisions of Order 55 it is certainly desirable, if the question be not one of the net construction of a document, that the facts which are material for consideration by the Court should not be in controversy. In the present case, although we are aware that there is a large amount of documentary evidence in existence relating to the nature and constitution of the College of Surgeons in Ireland, neither in the Court below nor in this Court has there been an opportunity of considering much of this evidence. The affidavit on which the application was grounded could not have been more bald. The affidavit put in in reply is equally uninformative, and counsel on both sides have elected to discuss the

(1) [1899] 1 Q. B. 871.
(2) [1911] 2 I. R. 173.
(3) 13 I. C. L. R. 48.
(4) 1 Dr. & W. 58.
(5) 10 Co. 1.

question in the light of the information supplied by the Calendar printed by the College of Surgeons, which contains selections from the various charters relating to that body. A similar question may arise in the future in a case where a larger amount of money may be involved, and which it might be thought advisable to bring before a higher tribunal, and I should certainly desire that it should appear in some way on the face of the record that we have arrived at our present decision on the very limited amount of information brought before us.

The question, which has been argued with much ability on both sides, is whether the bequest to the College of Surgeons contained in the will of this lady was or was not a charitable bequest. It is to be observed that she in no way ear-marked the money for a charitable purpose. If she had done so, the fact that the corporation of the College of Surgeons may have within its objects certain ones which are not charitable in their purpose would not be conclusive one way or the other. If the testatrix had impressed her gift with a charitable object, the bequest would prima facie have been a charitable bequest, and a question would then have arisen as to the legacy being void owing to the death of the testatrix a few days after she executed her will.

Now, the charters to which Mr. FitzGibbon has referred undoubtedly do contain recitals which, to some extent at least, suggest that the functions of the College of Surgeons in Ireland may be charitable in their nature. These recitals, as so often occurs in the case of documents of that period, are somewhat grandiloquent in language. Reference is made to the regulation of the profession of surgery as being "of the utmost importance to the public, and highly necessary to the welfare of mankind"; and in the charter of George IV, granted in the year 1828, it is recited that the former charter of George III in 1784 "has, from that period to the present day, had the most beneficial influence, by improving the profession of surgery, and thus promoting the welfare of the nation at large, and particularly by providing a sufficient number of properly educated surgeons, as well for the service of the public in general as for that of our army and navy." Mr. FitzGibbon has contended that these recitals stamp, so to speak, the whole character of the College of Surgeons, and

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show that its whole objects and functions must be held to be referable to what is so clearly pointed out in these recitals, and were in no way of a personal or selfish character.

There is much force in that argument, and so far as it goes effect must be given to it; but it would to my mind be as fallacious to arrive at the conclusion from these recitals that what may be termed the charitable objects of the body were the sole ones in view as it would be to determine the quantum of piety possessed by a testator from the religious sentiments which, not so long ago, draftsmen were wont to introduce into wills. We have to look at these charters as a whole, and discover their natural effect and meaning.

Mr. Justice Barton appears to have been chiefly influenced in his decision by the somewhat analogous case in England of *In re the Royal College of Surgeons in England* (1), where the question arose as to the application to the property of the college of sect. 11 of the Customs and Inland Revenue Act, 1885. That section imposed a duty upon the annual value, income, or profits of property belonging to any corporate or unincorporated body subject to an exemption in favour of property which, or the income or profits whereof, should be legally appropriated and applied for the promotion of education, literature, science, or the fine arts; and it was held that as the promotion of the interests of those practising surgery was one of the main objects of the college, this being an object in respect of which no exemption could be claimed, the only exemption that could be claimed under sect. 11 was in respect of property or income so appropriated as to create a legal obligation to apply it to the promotion of the science of surgery.

That decision really turned on sect. 11 of the Act, and it has been rightly contended that it does not determine the larger question involved in the present case. So, too, with regard to the two cases of the *Commissioners of Inland Revenue and Scott* (2), and *O'Neill* v. *Commissioners of Valuation* (3); the one decided under the Customs and Inland Revenue Act of 1885, and the other under the Irish Valuation Acts. I do not think much

(1) [1899] 1 Q. B. 871. (2) [1892] 2 Q. B. 152.
(3) [1914] 2 I. R. 447.

assistance can be derived from them. *In re the Royal College of Surgeons in England* (1) is, however, of considerable value in the present case by reason of the manner in which the Court of Appeal approached the question there involved. The charters of the English College of Surgeons are of a somewhat different character from those of the Irish College, but those of the two countries unite on this common ground that they deal with the establishment of the new colleges as being of great consequence to the commonwealth of the kingdom by the promotion of the art and science of surgery. An examination of the charters, however, in their essential particulars, satisfied the Court in that case that there were two main objects contemplated by the charters, one being the promotion of the art and science of surgery, and the instruction of candidates to qualify them for the efficient practice of their profession; the other a different object, namely, the due regulation of the profession of surgeons and the promotion of the interests, and the discipline of the members, of that profession after they had been educated in their art. One object begins where the other ends; one is essentially and purely a charitable object; the other is prima facie not a charitable object. The language of Romer L.J., at p. 877 of the report, expresses the general proposition very clearly. Having differentiated the case of civil engineers, he says: "The college has two main objects, each of great importance; in fact, it would be difficult to say which of the two main functions imposed on and discharged by the college is the more important. Neither can be considered as merely subsidiary to the other. The one may be shortly described as the promotion of the science of surgery. The other is the promotion and encouragement of the practice of surgery, including the promotion of the interests of those practising, or about to practise, surgery as a profession, and also including the examination of students and others to qualify for practice or honours in surgery or kindred subjects."

It will be noted that Romer L.J. does insert in both categories some subject-matter possibly not of a purely personal character. He was dealing with section 11 of the statute before him, the

(1) [1899] 1 Q. B. 871.

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Customs and Inland Revenue Act, 1885, and it was not necessary for him to make the other broader distinction which must be made here. But that these were the two main objects of the college recognized in that case appears to me to be clear. Now there can be no doubt but that it is for the benefit of the commonwealth and for the amelioration of suffering that there should be constituted a body of medical men who should see that members of the profession are not only competent in their art, but conscientious in the discharge of their art in relation to the general public; but, as in many other things, that which is a charity may come in in the end with that which is purely selfish; and while it is for the benefit of the public that these eminent gentlemen should be incorporated for the purpose of instructing the youth in learning this great healing art, and it is also for the benefit of the public that they should keep up a high standard of professional conduct, it would be ridiculous to suggest that in the latter case they are discharging charitable or other than selfish purposes.

We find then these two distinct objects contemplated—one charitable in its nature, the other not. We find it provided in clause 6 of the charter of George IV that meetings of the college may be called; and power is given to make, ordain, &c., "bye-laws, ordinances, rules and constitutions . . . for the regulation, government and advantage of the said body"; and amongst other provisions is contained the power of "inflicting upon all and every delinquent or offender, whether apprentice, pupil, member, or licentiate," reasonable pains, penalties, and punishments. The oath or declaration to be taken by licentiates binds them to "observe and be obedient to the statutes, byelaws, and ordinances" of the college, and to "endeavour to promote the reputation, honour, and dignity of the said college," and the oath or declaration of the fellows is to the like effect.

I am satisfied from a consideration of these and other clauses to be found in the charters that by the incorporation of this body with such great powers there was to be effected the second great object I have mentioned—that of keeping the profession of surgeons honourable in its conduct, and of ensuring its discipline, so that anything in the nature of unprofessional conduct could be punished by the corporate body. It was further pointed out in

the course of the argument that until comparatively recent times the system of apprenticeship prevailed, under which a youth was apprenticed to a member of the body in the same manner as to a land agent or stockbroker. This apprenticeship might be either indoor or external; it was open to the body to regulate the fees and emoluments of the member to whom an apprentice was bound, and it might also insist that no one should be admitted as a licentiate unless he had been previously apprenticed to a member of the body. It would also be open and legitimate to the body to expend money on providing the necessary machinery for the detection or prevention of anything which might be regarded as casting a slur on the honour and character of the profession.

I mention these matters to show how necessary it is to keep distinct the charitable functions of the corporation from those which cannot be so considered. Were it otherwise the Incorporated Law Society and the Society of the King's Inns might well be considered charitable institutions.

The College of Surgeons having then these two main objects, one a clearly charitable object, the matter would be simple had the testator chosen to ear-mark the purpose to which the bequest was to be applied, and had she impressed it with a charitable purpose and died within three months from the date of the will, the disenabling clause would have taken effect. When the gift is not so impressed with a charitable purpose it cannot be said that the corporation is not entitled to receive the money because it might be applied to purposes other than charitable ones. The body corporate would be entitled as such to receive the legacy and to give a good discharge for it; and it would not be open to an executor or trustee to demand to know what was going to be done with the money. That I take to be elementary, and to be conclusive in this case, and to dispose of the argument pressed on us by Mr. FitzGibbon. His contention was that this was altogether a charitable association, one whose functions were such as technically came within the definition of charitable functions, and accordingly that the respondents could not be heard to say that they would appropriate the legacy to non-charitable objects. I cannot agree with this contention.

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I do not wish to be taken as acceding to the suggestions made by Mr. Jellett, based on the decision in *Bowman* v. *Secular Society, Ltd.* (1), namely, that it is not open to the Court to consider whether or not the objects of the college, or any of them, are charitable, as the college is a legal body, and of necessity a bequest to it vests in the college beneficially. It is unnecessary for me to express an opinion upon this point.

The judgment of Barton J. was correct, and must be affirmed.

RONAN L.J.:—

From a consideration of the very meagre particulars before us I have arrived at the same conclusion as the Lord Chancellor. However, as Mr. Jellett has relied so strongly on the judgments in *Bowman* v. *The Secular Society* (1), I wish to add a few words in reference to that case. The main argument there against the validity of the gift was, as the case of *Ashbury Company* v. *Riche* (2) established, that a company under the Companies Acts can only apply its funds for the purposes specified in its memorandum of association, a gift to such a company is really a gift to the company either as trustees for these purposes or a gift which they are bound to apply for these purposes, and that if the purposes are illegal, the gift must fail. Lords Dunedin, Parker, and Buckmaster certainly refused to accept this view, and held that a gift to such a company is a gift to a legal entity, and that the donee takes it just as an individual would take a similar gift.

It seems to me that this statement of the law applies with much greater force to the present case. The College of Surgeons is a common law corporation created by charter. It is not created directly or indirectly under the provision of any statute. The law applicable to such a corporation is wholly different from that applicable to a statutory corporation. In the *Ashbury Case* (3), in the Exchequer Chamber, Blackburn J. states the law thus:—"But it is of great importance when we come to construe a statute creating a corporation to consider what would be the incidents at common law conferred on a corporation created by charter. The leading authority on this subject is the case of *Sutton's Hospital* (4). There were many points raised in that case. Those which I think material to the present point arose on a part of the

(1) [1917] A. C. 416.
(2) L. R. 7 H. L. 653.
(3) L. R. 9 Ex. 224, at p. 262.
(4) 10 Co. 1*a*.

charter set out in the special verdict (1), by which the King incorporated the first governors of the Charter-house, and especially provided—1. That they should have power to purchase, etc., as well goods, chattels, etc., as lands. 2. To sue and be sued. 3. To have a common seal, 'whereby the same corporation shall or may seal any manner of instrument touching the said corporation and the manor, lands, etc., thereto belonging, or in any wise touching or concerning the same. Nevertheless, it is our true intent and meaning that the said governors for the time being and their successors, nor any of them, shall do, or suffer to be done, at any time hereafter, any act or thing whereby or by means whereof any of the manors, etc., of the said corporation or any estate, etc., shall be conveyed, etc., to any other whatsoever contrary to the true meaning hereof, other than by such leases as are hereafter mentioned; and that in such manner and form as are hereafter expressed, and not otherwise.' The King, therefore, by this charter not only did not in express terms give a power of alienation, but by express negative words forbade any alienation except by lease. But the resolution of the Court, as reported by Coke (at p. 30*b*), was that 'when a corporation is duly created all other incidents are tacite annexed . . . and, therefore, divers clauses subsequent in the charter are not of necessity, but only declaratory and might well have been left out. As—1. By the same to have authority, ability, and capacity to purchase; but no clause is added that they may alien, etc., and it need not, for it is incidental. 2. To sue and be sued, implead and be impleaded. 3. To have a seal, etc.; that is also declaratory, for when they are incorporated they may make or use what seal they will. 4. To restrain them from aliening or demising but in a certain form: that is an ordinance testifying the King's desire, but it is but a precept and doth not bind in law.' This seems to me an express authority that at common law it is an incident to a corporation to use its common seal for the purpose of binding itself to anything to which a natural person could bind himself, and to deal with its property as a natural person might deal with his own. And, further, that an attempt to forbid this on the part of the King, even by express words, does not bind at law, nor am I aware of any authority in conflict with this case."

(1) 10 Co. 10*b*.

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In the House of Lords no dissent was expressed from this statement of the law as to common law corporations. The judgment was based on the different nature of the Statutory Corporation. The law was laid down to the same effect by Bowen L.J. in *Wenlock* v. *River Dee Commissioners* (1). See also vol. 8, Halsbury, p. 359, article 805, where the distinction is clearly stated. In the statement in note (*m*), that "the principles laid down in the *Ashbury Case* (2) and *Att.-Gen.* v. *Great Eastern Railway Co.* (3) apply to other corporations besides those created under the Companies Acts," the words "other corporations" must be read "other statutory corporations." Lord Watson's statement at pp. 362-3 of 10 A.C. is expressly limited to "corporations created by Act of Parliament."

It would appear from these passages that directions in the charter as to the application of the property of the corporation could not be directly enforced, and that the only remedy was a scire facias to repeal the charter. The concluding passage in the judgment of Lord Buckmaster in *Bowman's Case* (4) seems to suggest that a similar course would be the only remedy in the case of a company formed for an illegal purpose. It would appear that directions in a charter as to application of property were not enforceable in equity as trusts or otherwise. In the case of municipal corporations it was clear that the Court of Chancery had no jurisdiction to interfere prior to the Municipal Corporations Acts in England and Ireland. Sir G. Vanston, in his note to sect. 131 of the Municipal Corporations (Ireland) Act, 1840 (Vanston's Municipal Corporations Acts, p. 97), says: "Before 1840 municipal corporations were the owners of the corporate funds, and might do whatever they liked with them, but the Act reduced them from the position of owners and made them mere trustees of the corporate property for the purposes defined by this section, so as to render the borough fund applicable to those purposes." Then he gives a valuable collection of authorities supporting this proposition, commencing with *Parr* v. *Attorney-General* (5), where Lord Campbell pointed out in his

(1) 36 Ch. D., at p. 685, note.
(2) L. R. 9 Ex. 253.
(3) 6 Ch. App. 572.
(4) [1917] A. C. 406.
(5) 8 Cl. & F. 409.

judgment that, before the Municipal Corporations Regulation Act passed, corporation property was not subject to trust, and "the corporations might do with it whatever they chose." Sir G. Vanston also cites the judgment of Blackburne C.J. in *Rothwell* v. *Borough of Dublin* (1): "The Municipal Act has converted what was private property into trust property, and has clothed that property with an appropriation to specific purposes"; and the judgment of Palles C.B. in *R.* (*Vance*) v. *Corporation of Dublin* (2): "This borough fund, constituted by the Act of 1840, was by that Act made a trust fund, and, consequently, liable to the jurisdiction of the Court of Chancery like other trust funds. It was an entire, indivisible fund, and its application, so long as it was confined to purposes of the trust, is subject only to the jurisdiction of the Court of Chancery." Sir. G. Vanston brings his list of authorities down to *Attorney-General* v. *Winton* (3), and what he states in this note seems to be perfectly well settled law.

The result would appear to be that no application of its own property could be restrained as ultra vires on the part of a common law corporation. On the other hand, in the case of a statutory corporation, the Attorney-General can by action in a proper case obtain an injunction if they exceed their powers: 1 Lindley, p. 377, and cases there cited. It therefore appears to me that all the observations in *Bowman's Case* (4) as to the effect of a simple, direct gift to a corporation apply much more strongly to a case like the present of a common law corporation, than to the limited company in that case.

The fundamental proposition in the judgments of the three lords I have named is that a "company is not a trustee for the purposes of its memorandum," and a simple gift to a company is on the same footing as a simple gift to an individual. "If I give property to a company to be applied at its discretion for any of the purposes authorized by its memorandum and articles the company takes the gift as absolutely as would a natural person to whom I gave a gift to be applied by him at his discretion": Lord Parker, pp. 440-1. But if these purposes were all charitable

(1) 12 I. L. R. 206.
(2) 40 I. L. T. R. 57.
(3) [1906] 2 Ch. 106.
(4) [1917] A. C. 406.

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surely this would create a charitable trust just as much as if the charitable purposes in the memorandum were stated on the face of the will. Lord Parker says: "A gift of a fund on trust to pay the income thereof in perpetuity to a society might possibly be established as a charitable gift exempt from objection on the ground of perpetuity; but it is one thing to establish a gift (which would otherwise fail) on the ground that it is charitable, and quite another thing to avoid a gift which would otherwise be good on the ground that it creates an unenforceable trust." But to be "established as a charitable gift" there must be a valid charitable trust, and a charitable trust is always an enforceable trust. Lord Parker does not suggest for a moment that a gift good on the face of it cannot be avoided on the ground that it creates an otherwise enforceable trust, if the effect of enforcing the trust would be to make the gift unlawful.

This is, I think, the only reference to charity in the case. The judgments were not directed to the subject of charitable gifts. It is little more than a passing observation; but I have felt bound to refer to it in detail, having regard to the "great weight which" (as Lord Atkinson says) "must always be attached to any opinion expressed by Lord Parker" (1).

If all the objects of the memorandum of association were charitable objects in the legal sense it would raise to some extent one of the difficult questions in this case, viz., the effect of a simple gift to such a corporation.

A corporation can be a trustee, and if it takes property as a trustee it does not take it discharged from the trust any more than an individual would so take it. The 16th section of the statute 7 & 8 Vict. c. 97 is analogous to the Mortmain Acts. It is quite settled that a devise on a valid charitable trust is within the Act. If the trust be expressed on the face of the will, the devise is void both as to the legal and equitable estates. If there is only a secret trust for charity, the devisee takes the legal estate, but the beneficial gift is void. See cases collected at p. 394 of the last edition of Theobald.

Mr. FitzGibbon's first proposition is that this is a gift on what

(1) [1918] A. C., at p. 133.

would be a valid charitable trust but for the 16th section of the 7 & 8 Vict. c. 97. If it is, for the reasons I have stated, I do not think there is anything in *Bowman's Case* (1) to prevent the application of the section. Mr. FitzGibbon's next proposition is that in the section "charitable uses" mean uses within the meaning of the statute of Elizabeth. I think he has established this proposition, and further that the case of *The Royal College of Surgeons* (2) on the 48 & 49 Vict. c. 51, sect. 11, sub s. 3, does not decide the question whether that college was a charity within the statute of Elizabeth.

Having regard to the powers of common law corporations over their property, and to the Municipal Corporation cases, I find a difficulty in seeing how mere directions in charters can establish enforceable obligations as to the disposition of property given to such corporations otherwise than by the charter. At all events, I think it plainly follows from Lord Parker's judgment in *Bowman's Case* (1) that, where there is a simple gift to a corporation, and it is sought to avoid this gift by showing that it is subject to an enforceable trust, the onus of proving this enforceable trust lies on the party seeking to avoid the gift. Here we have a simple gift "to the Royal College of Surgeons in Ireland." There is no trust expressed on the face of the will. The gift is to a common law corporation. What obligation is there on the corporation to apply it in any particular way? Mr. FitzGibbon's reply is in substance—It is a charitable corporation within the meaning of the statute of Elizabeth. In Tudor's Charitable Trusts, at p. 104 (3rd edition), the law is stated thus: "Where a gift is simply made to a charitable corporation, the subject-matter of the gift is at once impressed with a trust for the charitable purposes for which the corporation is created." If "charitable corporation" in this passage means a corporation which is bound either at law or in equity to apply all its funds for charitable purposes, I think there can be no objection to it; but I do not think it can be extended beyond this. Four cases are cited in Tudor in support of this proposition. One of them, *Sonly* v. *Clockmakers'* (3) was not a case of a charity. In *Attorney-General*

(1) [1917] A. C. 406. (2) [1899] 1 Q. B. 871.

(3) 1 Br. C. C. 81.

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v. *Sidney Sussex College* (1) the gift was to the college "for the only use education in piety and learning of the descendants of certain relatives of the testator." In *Re Douglas* (2) Kay J. and the Court of Appeal found that the will clearly indicated the intention of charity. The last case is really the only one relied on by Mr. FitzGibbon, viz., *Incorporated Society* v. *Richards* (3). Mr. FitzGibbon asked us to treat as immaterial the fact Sir E. Sugden points out, that the name of the society indicated the charitable object, but I find Lord Hatherley saying (at pp. 730 and 731, 4 Ch.): "Lord St. Leonard's there says, that the words of a devise to the Incorporated Society in Dublin and their successors for ever for promoting English Protestant Schools in Ireland including, as they do, the very objects for which the society was incorporated, appear to imply that the devise was made to the society in that character, and thereby, as it were, to impress the estate with the charitable purposes for which the society was created." Lord Hatherley was familiar with the distinction between common law and statutory corporations, for in *Arnold* v. *Mayor of Gravesend* (4) he says that the effect of the Municipal Corporations Act was "to make the new corporation" (the statutory corporation) "trustees for public purposes, whereas previous to the Act corporations had been owners of the corporate funds and capable of disposing of them in any manner they pleased, the 92nd section having thus, as it were, fastened a trust upon the whole income of the corporation."

But the "Incorporated Society" was a common law corporation. There was no trust imposed on their property. Accordingly in that case he treats Sir E. Sugden as holding that the words of the will "impressed the estate with the charitable purposes for which the society was incorporated." If the law was that a simple gift to a common law corporation whose name afforded no clue to its objects was a charitable gift once it was shown that the corporation had been created for a charitable purpose, all this reasoning in the *Sidney Sussex Case* (1) would have been unnecessary. Lord Hatherley's observations seem to me to point to the view

(1) 4 Ch. 722.
(2) 35 Ch. D. 472.
(3) 1 Dr. & W. 293.
(4) 2 K. & J., at p. 581.

that a simple gift to a common law corporation, who can deal with their property in any way they please, is not charitable, although the corporation was created for a charitable purpose, the reason for this being that though the charter might be revoked if the corporation did not act in accordance with the objects, still so long as the corporation continued there was no enforceable obligation on them to do so.

I asked Mr. FitzGibbon if he could refer us to any case except *The Incorporated Society* v. *Richards* (1) on this point, but he did not do so. I found a case of *Spillar* v. *Maude*, reported in a note in 32 Ch. D., at p. 156. This case is recognized as law in *Re Lacy* (2). It appears, however, that there was a deed expressly declaring the trusts of the property of the society.

I am not satisfied that the authorities justify the statement of the law in Tudor, if it covers such a case as the present. I shall, however, assume, for the purposes of the rest of this judgment, that if the college in this case was created exclusively for charitable purposes, the bequest would be void as a charitable bequest under sect. 16. It seemed to me that the *Clifford's Inn Case* (3) was the strongest case in Mr. FitzGibbon's favour, but that was a case of a wholly different nature. It was a grant of property upon express trusts. Whether such a grant is contained in a charter or any other document, it is always competent for the charterer to fasten a lawful trust on the property whether the grantee be an individual or a corporation, common law or statutory. In such a case, the trust is found in the instrument granting the property. It was a grant to an unincorporated existing association, not a simple grant, but one with the object, intents, and purposes expressed on the face of the grant. Romer L.J., at p. 781, says:—"The trusts in the case before us were for the maintenance of schools of learning—namely, the learning of the law." [The Lord Justice here read the account of the Inns of Chancery in chapter 49 of Fortescue's De Laudibus Legum Angliae.]

Here we have merely a specific gift to a corporation. The Lord Chancellor has already discussed the Charters, so far as they

(1) I Dr. & W. 293. (2) [1899] 2 Ch., at p. 149.
(3) *Smith* v. *Kerr*, [1900] 2 Ch. 511; [1902] 1 Ch. 774.

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are before us, and I shall not repeat what he has said. It is, however, important to observe that they contain no grant of property to the corporation, to which any trusts for charitable purposes could be attached. I agree that these charters disclose two main objects in founding the corporation, one educational, and the other the making of regulations affecting those who practise the honourable profession of surgery. Mr. FitzGibbon has relied upon certain of the recitals as showing that the charters were granted in view of the welfare of the public. But a recital in a charter that a certain purpose was a public or charitable purpose would not render it such. He further contends that it is for the interests of the public that there should be an ample supply of well-educated and competent surgeons. That is so, but it is equally in the interests of the public that there should be intelligent and honest lawyers and engineers. It is essentially important in these days that there should be competent railway officials and officers of the mercantile marine—equally important, in my opinion, that there should be skilful and competent plumbers. But it could not be reasonably contended that a specific gift to a society of plumbers, founded to regulate the welfare of the men themselves, was in any way a charitable gift. Even assuming, however, as has been contended, that the gift to this corporation was a gift subject to a trust in favour of the purposes for which the corporation was originally created, the corporation would, as the Lord Chancellor has pointed out, be at liberty to apply the gift for those of its purposes which are not charitable in their nature, and this is a sufficient answer to Mr. FitzGibbon's argument.

I agree in the judgment of the Lord Chancellor.

MOLONY L.J. :—

By her will, dated the 29th day of March, 1917, Anna Maria Read devised and bequeathed all her property of every kind to her trustees and executors therein named upon trust, to sell the same, with one exception therein referred to; and she directed that her said trustees and executors should hold the proceeds of such sale upon trust to pay thereout certain legacies, including

one in the following words :—"To the Royal College of Surgeons in Ireland £500."

The testatrix died on the 4th April, 1917, four days after the execution of her said will, leaving real estate valued at £5800, and personal estate valued at £417.

This summons was brought to determine the question whether the bequest mentioned is a bequest for charitable uses within the meaning of 7 & 8 Vict. c. 97, s 16, because in that event the legacy would be void in so far as it was payable out of realty, the testatrix having died within three months of the execution of her will.

The College of Surgeons contend that they are not a charity, and that consequently the legacy is payable to them notwithstanding the provisions of the statute. Barton J. agreed with this contention, and has by his order declared that the bequest is not a charitable bequest.

In order to ascertain whether any gift to charity in Ireland constitutes a valid charitable use, one has to consider the Irish statute 10 Charles 1, s. 3, c. 1 (1634), which followed the English statute, 43 Elizabeth, c. 4 (1601). The words of these two statutes, though varying in some respects, are in substance the same; and the English cases, on the construction of the statute of Elizabeth, have ever since the case of *The Incorporated Society* v. *Richards* (1) been held applicable to the Irish statute. In that case Sir Edward Sugden said—"I have minutely compared the two Acts, placing the charitable uses enumerated in one in juxtaposition with those to be found in the other, and I find very little difference between them. . . . The statute of Charles seems, therefore, an almost exact pattern of the statute of Elizabeth, and I have little doubt that the framers had the latter Act before them at the time they were preparing it."

In order to determine whether a gift to the Royal College of Surgeons in Ireland can be regarded as a valid charitable gift, it is necessary to inquire into the objects and constitution of the College. The words of the statute of Charles applicable to the present case are "for the erection, maintenance, or support of any college, school, lecture in divinity, or in any of the liberal arts or

(1) 1 Dr. & War. 258, at pp. 324-5.

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sciences." It is clear that gifts for the establishment of colleges, schools, scholarships, and prizes are all charitable; and it has been decided in a number of cases that gifts to learned societies and institutions for the advancement of science are in the same position. Thus, for example, in *Beaumont* v. *Oliveira* (1) gifts to the Royal Society and Royal Geographical Society were held to be charitable. Gifts will also be considered charitable where they are for the promotion of education in a particular subject. Examples of these will be found in *In re Berridge* (2), where there was a gift for the promotion of economic and sanitary science; *In re Allsop* (3), where there was a bequest for the promotion of art; and in *Yates* v. *The University College, London* (4), where there was a bequest for the purpose of founding a professorship in archaeology.

If, therefore, the gift in the present case could be considered merely as a gift for the advancement of the science of surgery, it would, in my opinion, be clearly a charitable gift. In order, however, to see whether it can be so construed, it is necessary to refer to the charters under which the Royal College of Surgeons was established, and under which it is now carried on.

The first charter to which we have been referred is the Charter of George III, dated the 9th of March, 1784. It recites that the King had been informed by the humble petition of certain persons therein named, described as the principal surgeons of the city of Dublin, that the regulation of the profession of surgery is of the utmost importance to the public, and highly necessary for the welfare of mankind, and that the public sustained great injury from the defects in the present system of surgical education in the Kingdom of Ireland, and that the regularly educated surgeons in the city of Dublin found themselves incompetent for the want of a charter to establish a liberal and extensive system of surgical education, and they consequently prayed for a charter. It then provides that the petitioners, and such others as should from time to time be elected in the manner thereinafter directed, be for ever a body politic and corporate, and

(1) L. R. 4 Ch. App. 309.
(2) 63 L. T. 470.
(3) 1 T. L. R. 4.
(4) L. R. 7 H. L. 438.

should be called by the name of the Royal College of Surgeons in Ireland, and they were given power to hold lands "for the common profit of the said college." Clause 4 provides for the making of bye-laws, and clause 10 provides for the holding of examinations, and the granting of letters testimonial to such persons as, after the examination, shall be, in the opinion of the examiners, duly qualified to practise surgery.

If this charter stood alone it might well be considered that the object of the institution was entirely educational. But the charter was not held to be comprehensive enough, and it was accordingly repealed by Charter of Geo. IV, dated 19th September, 1828. This last-mentioned charter recited that the college had the most beneficial influence by improving the profession of surgery, and thus promoting the welfare of the nation at large, and particularly by providing a sufficient number of properly educated surgeons as well for the service of the public in general as for that of the army and navy. Under this charter provision was made for the holding of courts and assemblies in order to treat and consult about the state and government of the College and the administration of the affairs thereof, and power was given to the President, or, in his absence, the Vice-President, censors and members, "to make, ordain, constitute, establish, ratify, and confirm, alter, annul, revoke or abrogate from time to time, such bye-laws, ordinances, rules, and constitutions as to them shall seem requisite for the regulation, government, and advantage of the said body, and the application and administration of the funds and property thereof, or touching or concerning qualifications of candidates for letters testimonial, and enrolment, registering, matriculation, admission and examination of members, pupils, students, and apprentices, the fees to be payable by them and every of them to the said college, or to any member or licentiate thereof, the terms and conditions of admission on taking them or any of them; and also for inflicting upon all and every delinquent or offender, whether apprentice, pupil, member or licentiate, such reasonable pains, penalties, and punishment, by censure, suspension, amotion, or fine, as to them the said President, Vice-President, and members, or the majority of them, so convened shall seem meet: provided such pecuniary penalty shall not exceed

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in any case the sum of £50, and so as such bye-laws, rules and constitutions be agreeable to the laws and statutes of our realm and be communicated to the members of the said college at large lawfully for that purpose convened by summons, and be ratified and confirmed by a majority of the members present when so convened."

The charter then provides for an oath or declaration (clause 13) to be taken by licentiates in the following words:—"I, A. B., do solemnly swear that I will observe and be obedient to the statutes, bye-laws, and ordinances of the Royal College of Surgeons in Ireland, and that I will to the utmost of my power endeavour to promote the reputation, honour, and dignity of the said college, and that I will not at any time hereafter practise, follow or pursue the business or profession of apothecary or druggist, or sell drugs or medicines within the city of Dublin or at any place within ten miles thereof. So help me God." The clause further provides that he shall execute a bond or obligation in the sum of £500 to the College, conditioned for the due and faithful observance, performance, and fulfilment of all and every the statutes, bye-laws, and ordinances of the college, and of the said declaration.

The effect of this charter was to make the college, not only an educational body, but also a disciplinary body, whose power over a licentiate extended all during his professional life.

A supplemental charter was granted on the 24th January, 1844, which provided for the appointment of the Fellows of the college and for the creation of a council; and further provided, by clause 7, that the council might also make and publish, and also alter, change, and annul from time to time such bye-laws, rules, ordinances, and constitutions as to them should seem requisite for the regulation, good government, and advantage of the said body and the licentiates of the said College, and also to provide regulations for inflicting upon any delinqent, whether apprentice or pupil, fellow or licentiate, such reasonable pains, penalties, and punishment, by censure, suspension, amotion or fine as to them should seem meet: provided that such pecuniary penalty should not exceed in any case the sum of £50. There was also a provision that the bye-laws should be approved of by a Secretary of State.

Clause 18 provides that a diploma may be declared void by

the council for fraud, or for violation of a bye-law; and clauses 19 and 20 provide for declarations to be taken by licentiates and fellows respectively, in which they declare that they will observe and be obedient to the statutes, bye-laws, and ordinances of the college.

Two supplemental charters have since been granted, dated respectively the 31st October, 1883, and the 23rd May, 1885; but it is unnecessary to refer to these beyond saying that they still further emphasize the two main functions of the College, namely, 1, the promotion of the science of surgery; 2, the safeguarding of professional interests of those to whom they have granted diplomas.

The bye-laws of the College and the ordinances of the council are also of importance as showing the powers and duties of the council. By the 11th bye-law any fellow who shall be convicted before the council of having made a false or a corrupt report, or given a false certificate to any magistrate, insurance company, public board, or other body or individual respecting the state of health of any person, shall be expelled, and if a licentiate shall be so convicted his letters testimonial shall be withdrawn. By the ordinances of the council provision is made for the appointment of four standing committees — (*a*) Finance Committee, (*b*) Education Committee, (*c*) Examination Committee, and (*d*) General Purposes Committee. The duties of the first three committees sufficiently appear from their title. The duty of the General Purposes Committee is to inquire into and report upon all medico-political and parliamentary matters which, in the opinion of the committee, should be reported to the council; to draft the annual report of the council; and to inquire into and, when necessary, to report upon any charges of misconduct made against fellows or licentiates of the college; and to report upon all such matters as may be remitted to them, and to do all such acts thereupon as may be authorized or required by the council. The bye-laws also provide that the number of any deputation to represent the college in London, or elsewhere away from Dublin, shall not exceed two, in addition to the President or Vice-President, and that the sum payable to each member of such deputation shall be as viaticum first-class railway fare, and as

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honorarium £5 5*s.* for each day during which the delegate shall be unavoidably absent from home transacting the business of the council.

It is clear, therefore, that one of the objects of the College is to become acquainted with all intended legislation, and to take all proper steps to safeguard the interests of the profession, and in furtherance of this object, if need be, to send deputations to London or elsewhere on the business of the college, and to pay the expense of such deputations out of the corporate funds. This object is, no doubt, very useful, but in no sense can it be regarded as charitable.

It was contended on behalf of the residuary legatee that the case of *Smith* v. *Kerr* (1) is conclusive as showing that the gift was charitable. An examination of that case will, however, show that all it decides is that if the object and functions of the college were confined to education the gift would be charitable. By an indenture of feoffment of March, 1618, the messuage and premises known as Clifford's Inn was assigned to certain members of the society as trustees in consideration of £600, with a declaration that the true intent and meaning of the deed was that the said messuage was for ever thereafter to retain and keep the same usual and ancient name of Clifford's Inn, and should for ever thereafter be continued and employed as an Inn of Chancery for the good of the gentlemen of that society, and for the benefit of the commonwealth, as aforesaid, and not otherwise, nor to any other use, intent, or purpose.

It was held by Cozens Hardy J., and affirmed by the Court of Appeal, that the deed negatived the idea of private ownership, and that the property was held by the trustees upon trust for charitable purposes. Cozens Hardy J. examined at some length the history of the Inn previous to 1618, and he said (p. 520): "From these sources it appears to be established that at the date of the conveyance of 1618 the Society of Clifford's Inn was an ancient unincorporated voluntary society, subject in some vague sense to the Inner Temple, and to the jurisdiction of the judges. It was discharging the functions of a college in a legal university."

(1) [1900] 2 Ch. 511; [1902] 1 Ch. 774.

It appears from Sir John Fortescue that, as far back as 1470, the Inns of Chancery, of which Clifford's Inn was one, were places where the students went to study the very first principles of law, and after they had made some progress, and were more advanced in years, they used to be admitted into one of the Inns of Court. The object of the institution being in its inception and at the time of the execution of the feoffment purely educational, the property was obviously held for a charitable purpose within the meaning of the statute.

Barton J., in his judgment, relies upon the case of *In re the Royal College of Surgeons in England* (1), where it was held that the college was liable to the payment of corporation duties under the provisions of sect. 11 of the Customs and Inland Revenue Act, 1885. In that case exemption was sought under an exemption in favour of property of the descriptions following:—property which, or the income or profits whereof, shall be legally appropriated and applied for the benefit of the public at large; and property which, or the income or profits whereof, shall be legally appropriated and applied . . . for the promotion of education, literature, science, or the fine arts.

The case turned on the charters of the Royal College of Surgeons in England, which are not identical with those that we have to consider in this case, but certain principles laid down in the judgment of the Court of Appeal are applicable to the present case.

Romer L.J., in delivering the judgment of the Court, first points out the dual nature of the work and purposes of the college—(*a*) the promotion of the science of surgery, and (*b*) the promotion and encouragement of the practice of surgery, including the promotion of the interests of those practising or about to practise surgery as a profession, and also including the examination of students and others to qualify for practice or honours in surgery or kindred subjects. Having referred to the charters and the Medical Acts of 1858 and 1886 as showing the dual nature of the object and purpose of the college, he continued: "Now, so far as concerns property which may be legally appropriated and

(1) [1899] 1 Q. B. 871.

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applied to what we have called the second main function of the college, as distinguished from its other function of the promotion of the science of surgery, it appears to us clear that such property would not come within any of the exemptions from duty mentioned in sect. 11 of the Customs and Inland Revenue Act, 1885. It is equally clear that property which may be legally appropriated and applied by the college for the promotion of the science of surgery is exempt from duty. But a question arises as to the property of the college which is not legally appropriated and applied to one of the two main functions of the college as distinguished from the other. Of course in a case like that of the Institution of Civil Engineers no such question could arise. Where an institution has only one main object and purpose, any property belonging to and properly dealt with by the institution must of necessity 'be legally appropriated and applied' for that object and purpose, as was pointed out by the House of Lords. But in a case like the present, where the institution has two main objects, difficulties may arise both under the word 'applied' and under the words 'legally appropriated.' The difficulty under the word 'applied' would be merely one of fact, that is to say the difficulty of determining to which of the two objects the property or its income was in fact being applied. But the words 'legally appropriated' raise a question as to their meaning when used in sect. 11. They clearly mean something more than 'applied.' On the construction of the section, we agree with the view expressed in the case of the *Incorporation of Tailors in Glasgow* v. *Inland Revenue Commissioners* (1), and in the other authorities cited to the same effect, that the words mean that the property or its income is so appropriated as to create a legal obligation upon the part of its administrators to apply it in a particular manner. Now, there has been no legal appropriation in the above sense of any of the properties, the subject of the present appeal, or of their incomes, to the first main object of the college as distinguished from the second main object."

It is clear that in a case where a corporate body has two main objects, one of which is charitable and the other not, a gift in general terms cannot be considered as appropriated to the

(1) 14 R. 729; 24 S. L. R. 516.

charitable object, and is, therefore, not charitable within the meaning of the statute of Charles. Where, however, the property of a corporate body is in fact legally appropriated and applied substantially for the promotion of what would be considered a charitable object, and not for the promotion of the professional interest or advantage of the members, a gift in general terms would be held to be charitable, and in this connexion the valuable judgments of Lord Watson and Lord Macnaghten in *Commissioners of Inland Revenue* v. *Forrest* (1) may be referred to with advantage. I have not thought it necessary to refer to *Bowman* v. *Secular Society, Ltd.* (2), as it seemed to me not to be of much assistance in the present case, where no question of illegality could possibly arise.

Having carefully considered all the documents and other evidence placed before us, I am of opinion that the decision of Barton J. was right, and that this appeal ought to be dismissed.

Solicitors for the appellant: *Keating & Keating.*
Solicitors for the respondents: *T. Gerrard & Co.*

R. ST. J. C.

(1) 15 App. C. 334. (2) [1917] App. C. 406.

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July 24, 31.

GLYNN *v.* COGHLAN.

Landlord and Tenant—Surrender by act and operation of law—Lease for ever—Estoppel.

To constitute a surrender by operation of law there must be (1) an act of purported surrender invalid per se by reason of non-compliance with statutory or other formalities, and (2) some change of circumstances supervening and arising from the purported surrender which, by reason of the doctrine of estoppel or part performance, makes it inequitable for any of the parties to rely upon the invalidity of the purported surrender.

K., a lessee of lands for ever at a yearly rent, signed a document giving her husband C. authority to have his name entered on the rent receipt. The same day C. sent the document to the landlords, who, at his request, inserted C.'s name in their books. C. thereafter paid the rent. K. subsequently repudiated the document, and devised the lands to the plaintiffs.

Held, that C. had acquired no title in the lands.

TRIAL OF ACTION.

The facts as follows are taken from the judgment of O'Connor J.:—

A lease for ever of part of the lands of Ballyglass, in the county of Galway, containing 40 acres, Irish plantation measure, was made on the 5th of May, 1888, to one Kate Glynn, afterwards Kate Coghlan, subject to the yearly rent of £40.

By her will Kate Coghlan devised these lands to the plaintiff, James Glynn, and she appointed James Glynn and the other plaintiff, Michael Kelly, her executors. The plaintiffs claimed that on the death of Kate Coghlan these lands formed and are portion of her assets; the defendant, Kate Glynn's second husband, claimed these lands as his absolute property in the following circumstances:—

The husband and wife lived on the farm together. On the 13th November, 1916, a religious ceremony called a "Station" was held in the house. At the conclusion of the ceremony a document, drawn up by John Coghlan, was executed by his wife putting her mark thereto, and was witnessed by the Rev. Father

Broderick, who was one of the clergymen taking part in the ceremonies. The document is in these terms :—

"*November* 13*th*, 1916.
"Kilconnell, Ballyglass.

"I Kate Coghlan do hereby give my husband leave to get his name on the receipt.

"Her X mark
"Kate Coghlan.

"M. T. Broderick, C.C."

Later in the same day John Coghlan handed to Mr. Davidson, solicitor, Ballinasloe, the receivable order in the name of Kate Coghlan, the document signed by her, and the rent then due on the holding; and by his instruction Mr. Davidson forwarded on the same day to the landlords—the Congested Districts Board—the receivable order and the document; he asked the Congested Districts Board to send a new receivable order in the name of John Coghlan, to alter the name in their books; and he promised to send on the rent when that was done. In pursuance of this request, the Congested Districts Board, on the 1st December, 1916, altered the name in their books to John Coghlan; a new receivable order in his name was sent, and the rent was paid by him.

On the 18th December, 1916, James Glynn, a brother of Mrs. Coghlan, and one of the plaintiffs in this action, called on Mr. Davidson, and as a result of his instructions Mr. Davidson wrote to the Congested Districts Board that he was instructed that Mrs. Coghlan had repudiated the document; and he asked that nothing further should be done in the matter until he had seen Mrs. Coghlan. Mr. Davidson saw Mrs. Coghlan on the 22nd December at her own house; showed her the document, or a copy; and was by her instructed to write to the Congested Districts Board repudiating the document. Mr. Davidson carried out these instructions by writing to the Congested Districts Board asking to have Mrs. Coghlan's name reinstated in the rental.

The Congested Districts Board complied with this request, but subsequently, apparently as a result of an interview which one of their officials had with Father Broderick, they changed the name in the rental back again into the name of John Coghlan, and the name in their books at the present time is that of John Coghlan, and the receivable orders are made out accordingly.

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Fetherstonhaugh K.C. and *A. H. Webb*, for the plaintiffs:—

The document relied upon is not an assignment, and the facts do not create any new tenancy by operation of law. There could be no surrender in the present case, as there was no particular estate to surrender: *Lynch* v. *Lynch* (1); *Doran* v. *Kenny* (2); *Conroy* v. *Drogheda* (3); *Price* v. *Price* (4).

Serjeant Matheson K.C. and *MacCormack*, for the defendant:—

Since Deasy's Act a freehold lease for ever is on the same footing as any other lease: 23 & 24 Vict. c. 114, sects. 1, 3, 9. The facts in the present case amount to a surrender of Mrs. Coghlan's interest, and a re-grant or demise for ever of the lands to the defendant: *Bourke* v. *Bourke* (5); *Cooke* v. *Torrens* (6).

Cur. adv. vult.

July 31.

O'CONNOR J. [His Lordship, having stated the facts as above set out, proceeded]:—

The sole question I have to decide is, Did the document of the 13th November, 1916, and the change in the rental, give John Coghlan any title to the lands?

It is clear that the document signed by Kate Coghlan does not amount, per se, to a conveyance of the lands. Apart from the fact that it contains no description of the lands, it does not purport to convey them. It is what it purports to be, namely, an authority to John Coghlan to have his name put in the receivable order; it does not purport to be, nor is it, anything more.

It follows that if all that happened was the execution of this authority, the title of the plaintiffs to the lands would be perfectly clear. For example, Mrs. Coghlan could have revoked the authority at any time after its execution, and her husband would have no remedy. Equity will not aid an imperfect gift. But the defendant says that the change of name on the 1st December in the books of the Congested Districts Board, authorized, as I find it was, by the terms of the instrument, makes a

(1) 6 L. R. Ir. 131.
(2) I. R. 3 Eq. 148.
(3) [1894] 2 I. R. 590.
(4) 14 B. 598.
(5) I. R. 8 C. L. 221.
(6) 22 L. R. Ir. 239.

difference; that the transaction amounted to a grant or surrender to the landlords of Mrs. Coghlan's interest, and a re-grant or demise for ever of the lands to the defendant.

This contention makes it necessary for me to say a word as to the law relating to surrender by a tenant to his landlord, and the acceptance by the landlord of a new tenant, with the assent of, and in the place of, the outgoing tenant. For reasons which I shall presently state, I do not consider there was any "surrender" at all in the case; but even if I thought there could have been a surrender in respect of this fee-simple interest, I should still be obliged to decide against the defendant.

The cases on the subject of surrender by operation of law are numerous. I merely propose to indicate what I conceive to be the effect of them without dealing with them in detail. In my view, this principle may be deduced from them:—In order to constitute a surrender by operation of law there must be, 1, an act of purported surrender, invalid per se by reason of non-compliance with statutory or other formalities; and, 2, some change of circumstances, supervening on and arising from the purported surrender, which, by reason of the doctrine of estoppel, or part performance, makes it inequitable and fraudulent for any of the parties to rely upon the invalidity of the purported surrender. In other words, the acts of the parties, other than the surrender itself, bring into force a general principle of law which, operating upon an informal and worthless surrender, infuses validity into it. The supervening circumstances which may have this effect may vary according to the facts of the case. Possession is one of such circumstances, so that a verbal surrender, accompanied by delivery to the landlord and acceptance by him of possession, is good: *Dodd* v. *Acklom* (1); *Grimman* v. *Legge* (2); so also, where possession is given and a new letting made to another tenant: *Thomas* v. *Cook* (3); *Lynch* v. *Lynch* (4); *Wallis* v. *Hands* (5). It has been said that the delivery of possession is a necessary ingredient in such a transaction: *Wallis* v. *Hands* (5), supra; but in *Fenner* v. *Blake* (6), it was held that a verbal

(1) 6 Man. & G. 672.
(2) 8 B. & C. 324.
(3) 2 B. & Ald. 119.
(4) 6 I. L. R. 131.
(5) [1893] 2 Ch. 75.
(6) [1900] 1 Q. B. 426.

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surrender without delivery of possession, but followed by a contract for sale by the landlord, entered into with the express assent of the tenant and on the faith of his authority, was good, upon the ground, amongst others, of estoppel. This last case has been criticized (see Smith's Leading Cases, 12th ed., vol. ii, p. 882); but *Fenner* v. *Blake* (1), as I think, lays down no principle inconsistent with that which I conceive to run through the cases, namely, that a party will not be allowed to rely on the invalidity of a surrender if he has deliberately induced another to act upon it so as to cause that other to change his position and incur loss unless effect be given to the surrender. It follows that it must apply whatever be the nature of the term, and it has been expressly held to apply to a freehold term: *Lynch* v. *Lynch* (2); *Lynch* v. *Collins* (3).

This case, however, lacks the elements of a surrender by operation of law. There was no change of possession. There was nothing done or undone by John Coghlan to his detriment on the faith of the transaction. Mrs. Coghlan repented of her gift almost as soon as she had made it. There was no new letting or grant; for I agree with Mr. Fetherstonhaugh when he says that the change of name in the landlord's books merely amounted to the Congested Districts Board saying in effect, "We are prepared to take the rent from John Coghlan in the future." There was even, as I think, no liability on him to pay the rent thenceforward. For these reasons, even treating the case as one within the cases on surrender, I am of opinion that the defendant has no title to the lands.

I have hitherto dealt with the main contention of the defendants, namely, that there was a "surrender" by operation of law. On this branch of the case Mr. Fetherstonhaugh argued that there could be no surrender, because there was no particular estate to surrender. I agree with this contention, notwithstanding the definition of the relation of landlord and tenant in sect. 3 of the Landlord and Tenant (Ireland) Act, 1860. But I think it convenient to give my views as to the meaning of "surrender by operation of law," as they are, if sound, equally

(1) [1900] 1 Q. B. 426. (2) 6 I. L. R. 131.
(3) 1 Ir. Jur. (N. S.) 211.

destructive of the alternative argument of the defendants, that there was an "assignment by operation of law" within sect. 9 of the Landlord and Tenant (Ireland) Act, 1860. No such assignment, by estoppel or otherwise, is made out here.

A question of fact arises as to the chattels. I find as facts that Mrs. Coghlan had, on the occasion of her marriage, a certain amount of chattels on the lands; that the defendant on his marriage brought in £120, which he spent in buying and selling stock and otherwise in working the farm with his wife; that approximately he thereby acquired one half of the chattels; that the chattels at Kate Coghlan's death, which have been sold for £400, were the produce of the joint fund to which the husband and wife had so contributed; and accordingly I declare that he is entitled to one half of the chattels on the farm at his wife's death.

Each party has partly succeeded, and accordingly I direct plaintiffs and defendant to abide their own costs.

Solicitor for the plaintiffs: *Hutchinson Davidson.*
Solicitors for the defendant: *Golding & Sheil.*

D. M. S.

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1918.
April 12, 15.

Administration — Registered freehold land — Valuation under Intestates' Estates Act, 1890 — *Realty or Personalty — Local Registration of Title (Ireland) Act*, 1891 (54 & 55 *Vict. c.* 66), *ss.* 85, 86 — *Intestates' Estates Act*, 1890 (53 & 54 *Vict. c.* 29), *ss.* 4, 5, 6.

Freehold registered land to which Part IV of the Local Registration of Title (Ireland) Act, 1891 (54 & 55 Vict. c. 66), applies, is, for the purposes of the Intestates' Estates Act, 1890 (53 & 54 Vict. c. 29), real and not personal estate, and should accordingly be valued as such under the provisions of sect. 5 of the latter Act.

Case Stated by Madden J. at the Longford Summer Assizes, 1917, as follows:—

1. Thomas Farrelly, late of Currygrane, in the county of Longford, deceased, died on the 16th November, 1916, intestate, without lawful issue, and leaving his widow, the defendant, and lawful brothers and sisters, of whom the plaintiffs are two, and children of a lawful sister as his next-of-kin.

2. On the 13th December, 1916, letters of administration to the estate of the said deceased were granted to the defendant.

3. On the 20th February, 1917, a primary decree was made by the County Court Judge of Longford for the administration of the estate of the said deceased in the present suit.

4. The Clerk of the Crown and Peace by his certificate, dated the 19th April, 1917, found that the amount of the pure personal estate of the deceased was £419 1*s.* 3*d.* The deceased was also possessed of two farms of land situate at Currygrane, in the county of Longford, viz., (*a*) part of the lands of Currygrane, containing about 28 acres 3 roods and 15 perches statute measure, subject to an annuity of £7 8*s.* 6*d.*, payable to the Irish Land Commission until an advance of £212 has been repaid. The annual valuation of the said lands is £13 5*s.*; (*b*) part of the lands of Currygrane, containing about 11 acres and 2 roods statute measure, subject to an annuity of £4 1*s.* 2*d.*, payable to the Irish Land Commission until an advance of £116 has been repaid. The annual value of the said lands is £8 5*s.*

(1) Before Sir Ignatius J. O'Brien C., and Ronan and Moloney L.JJ.

5. The said lands were duly registered under the provisions of the Local Registration of Title (Ireland) Act, 1891, on the 18th April, 1916. The Clerk of the Crown and Peace by his said certificate held that the said lands descended as personalty in ascertaining the right of the defendant in respect thereto.

6. On the 3rd May, 1917, the County Court Judge confirmed the said certificate, holding that the lands should be valued as personalty under sect. 6 of the Intestates' Estates Acts, 1890, and ordered the sale of the said lands.

7. The defendant on the 7th May, 1917, appealed against the said order of the County Court Judge.

The appeal was heard by me on the 4th July, 1917.

8. Mr. Wylie K.C. and Mr. Wood appeared for the defendant, and contended that the lands, although registered under the provisions of the Local Registration of Title (Ireland) Act, 1891, should be valued as realty under sect. 5 of the Intestates' Estates Act, 1890. Mr. Wylie applied that a case be stated on the point for the decision of the Court of Appeal. Mr. Farrell appeared for the plaintiffs, and submitted that the lands should be valued as personalty under sect. 6 of the Intestates' Estates Act, 1890. Mr. Farrell agreed to the statement of a case to the Court of Appeal. As the matter was one of general importance, and would affect the rights of the parties in a very substantial manner, I acquiesced in the desire of the parties.

9. The question for the decision of the Court is: Should the lands, which are registered under the provisions of the Local Registration of Title (Ireland) Act, 1891, be valued for the purposes of the Intestates' Estates Act, 1890, as realty under sect. 5, or as personalty under sect. 6?

10. I adjourned the appeal to next Assizes, to enable the parties to obtain the decision of the Court on the important point of law raised by the appeal.

Wylie K.C. and *Wood*, for the defendant in the suit:—

Part IV of the Local Registration of Title (Ireland) Act, 1891, only applies to freehold registered land which has been at any time sold or conveyed to or vested in a purchaser under any of the provisions of the Purchase of Land (Ireland) Acts (sect. 1). The

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interest acquired by a purchasing tenant under these Acts is a freehold estate; the lands remain realty throughout, notwithstanding registration, and they must be valued as realty under sect. 5 of the Act of 1890, and not as personalty under sect. 6. That the interest acquired by a purchasing tenant is realty is clearly recognized in several cases: *Longworth* v. *Campbell* (1); *Naughton* v. *Naughton* (2); *Leonard* v. *Dowling* (3). There is no decision to the contrary. The Intestates' Estates Act, 1890, was in no way repealed by the Local Registration of Title (Ireland) Act, 1891. The statutory rights given to a widow by the earlier Act cannot be held to be taken away by the general provisions of the later Act, which does not mention the former. If under sect. 84 of the Act of 1891 the registered lands vest in the personal representative of the deceased registered owner, they do so subject to the statutory rights of the widow. Sections 85 and 86 merely provide machinery for carrying out the administration of estates. Our contention is fortified by the decisions under the Land Transfer Act, 1897, sect. 2 of which is taken verbatim from sect. 86 of the Act of 1891, the words "real estate" being substituted for "such land." In *In re Sharman, Wright* v. *Sharman* (4), it was held that, notwithstanding the provisions of the Land Transfer Act, estate duty payable in respect of real estate was not a "testamentary expense," and should be borne by the real estate and not by the general residuary estate of the testator. In *In re Jones, Elwood* v. *Kinderley* (5), it was held that the existing practice of the Chancery Division, that the costs of an administration action, so far as they were increased by the administration of the real estate, are to be borne by that real estate, was not altered or affected by the Land Transfer Act.

Joyce J., in *In re Williams, Holder* v. *Williams* (6), held that the Land Transfer Act conferred no new right of retainer or priority in favour of a personal representative against real assets. Joyce J. there said (p. 54), "It appears to me that prima facie the object of the first part of the Act—the only part that is relevant—was, speaking generally, to simplify and improve the

(1) [1910] 1 I. R. 23.
(2) [1910] 1 I. R. 363.
(3) [1916] 1 I. R. 359.
(4) [1901] 2 Ch. 280.
(5) [1902] 1 Ch. 92.
(6) [1904] 1 Ch. 52.

machinery for the administration of real estates, without altering in any manner the ultimate rights of the persons beneficially interested in the proceeds of such estates": *In re Kempster*, *Kempster* v. *Kempster* (1); *In re Manser*, *Killick* v. *Manser* (2). It is now accepted that estate duty payable in respect of registered lands which have been specifically devised is payable by the devisees of such lands, and does not come out of the general residue of the estate.

Carrigan K.C. and *Marnan*, for the plaintiffs:—

We contend that the registered lands in question must be valued as personalty under sect. 6 of the Act of 1890. The purpose of that Act was very clear, viz., to make provision for the childless widow of an intestate, to the extent of £500 of her husband's property. Lands were then either real or personal estate, and, according to their nature, were to be valued for the purposes of the Act, under either sect. 5 or sect. 6. Then the Act of 1891 was passed, entirely changing the devolution of freehold lands to which Part IV of the Act applies. That such a change was effected entirely differentiates this statute from the Land Transfer Act, 1897. As recognized by Joyce J. in *In re Williams*, *Holder* v. *Williams* (3), the latter Act did not affect the ultimate rights of the persons beneficially interested in the lands. But the Act of 1891 is not confined to matters of administration: it affects devolution of interest. The heading of Part IV is worded "Devolution of interest in freehold registered land sold under Purchase Acts." Under sect. 84 such land devolves to the personal representatives or representative, "as if it were a chattel real vesting in them or him." Under sect. 85, on the death of a person intestate as to any such land, the "beneficial interest shall devolve upon, and . . . be divisible among the same persons as if it were personal estate as to which he had died intestate." Whilst sect. 86 was introduced into the Land Transfer Act, 1897, sect. 85 was expressly omitted. We also rely upon sect. 86. We have thus to deal with a new species of land, formerly unknown to lawyers, and which must be treated as personal estate for the purposes of the Intestates' Estates Act.

(1) [1906] 1 Ch. 446. (2) [1910] W. N. 61. (3) [1904] 1 Ch. 52.

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It may be termed "real estate"; but that is not sufficient. It is real estate, with certain incidents attached to it, one of which is that it must be valued as personal estate under sect. 6 of the Act of 1890. There is contained in the Act of 1891 an implied repeal of sect. 5 of the Act of 1890 qua registered freehold lands to which Part IV of the Act of 1891 applies. The two cannot stand together.

They referred to *In re Heath, Heath* v. *Widgeon* (1); to *Inland Revenue Commissioners* v. *Cookman* (2); and to sect. 32, sub-s. 4, of the Land Law (Ireland) Act, 1896 (59 & 60 Vict. c. 4), which provides that an agreement for purchase, a vesting order, or fiat shall not operate to convert the interest of the purchaser into real estate.

Wylie, in reply.

SIR IGNATIUS J. O'BRIEN C.:—

This case involves a question of general importance, but it has been argued so clearly and fully that we do not require to reserve judgment.

Sect. 1 of the Intestates' Estates Act, 1890, provides in very clear terms that—

"The real and personal estates of every man who shall die intestate after the first day of September, 1890, leaving a widow but no issue shall, in all cases where the net value of such real and personal estates shall not exceed £500 belong to his widow absolutely and exclusively."

The last two words of this section are perhaps redundant; but the draftsman wished to put the matter beyond all doubt, and he used the words "absolutely and exclusively." The statute does not, of course, interfere with the rights of persons which may have attached to the estate in the hands of the intestate; but where a man dies intestate and without issue, and the net value of the property to which he is beneficially entitled does not exceed £500, the entire of that property is by this section given to his widow. This section does not itself contain any indication as to how the net value of the real or personal estate is to be

(1) [1902] 2 Ch. 270. (2) [1915] 2 I. R. 149.

arrived at, and accordingly sect. 5, which has to be read with sect. 1, provides as follows:—

"The net value of such real estates as aforesaid shall for the purposes of this Act be estimated in the case of a fee-simple upon the basis of twenty years' purchase of the annual value by the year at the date of the death of the intestate as determined by law for the purposes of property tax, less the gross amount of any mortgage or other principal sum charged thereon, and less the value of any annuity or other periodical payment chargeable thereon, to be valued according to the tables and rules in the schedule annexed to the statute 16 & 17 Vict. c. 51, and in the case of an estate for a life or lives according to the said tables and rules."

The statute thus adopts a mode of valuation which is clear and unambiguous. It is manifest that the value so determined may be very different from that which would be ascertained if the lands were sold, and there must have been from time to time cases in which, owing to the method of calculation provided by sect. 5, the widow of an intestate has got property which so far as the saleable value was concerned might be very much more valuable than the artificial value provided by the Act. The law, however, intended that, and it is not for us to question the wisdom or unwisdom of the provision, which to me seems a very reasonable one.

The second section of the Act deals with cases where the value of the property exceeds £500, in which case the widow is given a charge for £500 on the whole of the real and personal estate, with interest as from the date of the death of the intestate. For the purpose of ascertaining the value, however, one must always have recourse to sect. 5 as regards real estate, and to sect. 6 as regards personalty.

This being the state of the law, the present question has arisen with regard to lands purchased under the Land Purchase code, and compulsorily registered under the provisions of the Local Registration of Title (Ireland) Act, 1891. In the case of such lands the estate acquired by the purchasing tenant is one freed and discharged from all the incidents and attributes of the previous holding, save in so far as the statutory provisions enact, and the estate so acquired is an estate in fee-simple, the value of which, apart from the possible effect of the Local Registration

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of Title (Ireland) Act, would clearly require to be estimated in accordance with sect. 5 of the Intestates' Estates Act. It is said, however, that the effect of sects. 85 and 86 of the Local Registration of Title (Ireland) Act, 1891, has been entirely to alter the manner in which the valuation under the Act of 1890 is to be carried out, and an extremely able argument has been addressed to us on this matter, which cannot be lightly disregarded.

Sect. 85 of the Act of 1891 is as follows:—

(1) On the death of a person intestate as to any such land, the beneficial interest therein shall devolve upon and, subject to the provisions of this Act, be divisible among the same persons as if it were personal estate as to which he had died intestate.

It is not contended that sect. 5 of the Act of 1890 has expressly been repealed, but it is said that registered land must be dealt with as if it were personal and not real estate, and that sect. 5 of the Act of 1890 has no application to such land. I entertain no doubt whatever as to this question. Registered land possesses some of the attributes of personal estate—it is to be divisible as if it were personal estate; but that which for certain purposes is to be treated as if it were personal estate is not personal estate but real estate. This was the view so clearly expressed by Meredith M.R. in *Longworth* v. *Campbell* (1). He says (at p. 31):—"As I have said, when these sections 22, 28, 30, 36, and 37 are examined and read together with Part IV of the Act, it becomes plain that land purchased under the Land Purchase Acts, and registered as freehold registered land, remains real estate, and that all the Legislature has done is to enact that certain rules of law applicable to real estate are altered and modified to the extent specified in Part IV." That decision has never been questioned seriously down to the present case; and it has been expressly adopted by Barton J. in *Naughton* v. *Naughton* (2), where he says (at p. 364):—"The Master of the Rolls in *Longworth* v. *Campbell* (1) made a careful analysis of Part IV of the Local Registration of Title Act, 1891, and referred (at p. 33) to sect. 86. I beg to refer to that passage in his judgment, and respectfully to adopt it and apply it in the present

(1) [1910] 1 I. R. 23. (2) [1910] 1 I. R. 363.

case." That view appears to me to be perfectly correct. It is unnecessary for me to enter upon an elaborate analysis of the sections of the Act of 1891. Sect. 36 (1) provides that—

"On the registration of a transferee of land as full owner of the land, the instrument of transfer shall operate as a conveyance by deed within the meaning of the Conveyancing Acts; and there shall be vested in the registered transferee an estate in fee-simple in the land transferred, subject to such of the following burdens as for the time being subsist in reference to the land" . . .

Sect. 36 (2) provides that—

"On the registration of a transferee of land as limited owner of the land under a settlement, the registration shall have the same effect as in the case of a transferee registered as full owner, except that the estate in fee-simple conferred by the registration shall vest in the transferee and the other persons entitled to the several estates and interests comprised in the subject of the settlement collectively, according to such estates and interests respectively."

And so on, through a series of sections, we find the subject-matter dealt with recognized as an estate in fee-simple, and not as personalty. No doubt, it is an estate in fee-simple to which certain peculiarities attach on the death of the registered owner, but the estate remains fee-simple, and is not personalty. Counsel for the respondent had in the end to admit that one must describe it as real estate; but they contended that although it is real estate, it must go in a particular way which is exclusive of the Intestates' Estates Act.

Indeed, one has only to read sub-s. 4 of sect. 85 of the Act of 1891 to see that the framer of the section himself never contemplated such land except as real estate: "This section shall not apply to any freehold registered land of any person who is at the commencement of this Act entitled to that real estate . . ."

Sect. 85 of the Act of 1891 does create a difficulty, but I confess I am not able to follow the view that sect. 86 does. As regards sect. 86, I think the case is quite free from doubt. I think it is a sufficient answer to the contention based upon sect. 85 to say that the general provisions of the Act of 1891 cannot be considered as repealing the specific provisions of the Act of 1890, which confers upon a certain class of persons certain rights to be determined in a certain way. I have considerable doubt myself

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whether sect. 85 was really intended to deal with anything except the division of registered land in cases coming within the Statute of Distributions amongst the persons entitled thereto. It never could reasonably be considered to affect the specific rights given to a widow in the words "the real and personal estates . . . shall belong," &c.

For these reasons, I think the question should be answered that the lands should be valued as laid down in sect. 5.

RONAN L.J.:—

Although I cannot say that this case is free from doubt, I have, on the whole, arrived at the same conclusion as the Lord Chancellor.

To my mind the difficulty in the case arises wholly from sect. 85 of the Act of 1891, and not from sect. 86. Mr. Wylie, by his careful analysis of the Land Transfer Act, 1897, and by his comparison of sect. 2 of that Act—which admittedly in no way affects the devolution of estates—with sect. 86 of the Act of 1891, has entirely satisfied me that sect. 86 does not affect the question before us. My difficulty arises from the fact that, if one construes sect. 85 in its literal sense, it brings about an effect which is inconsistent with the Intestates' Estates Act, 1890.

If the two farms here in question are personal estate for all purposes, they must be valued as such under sect. 6 of the Act of 1890; and, reading sect 85 of the Act of 1891 literally, I can see no answer to the plaintiffs' contention that on the death intestate of the registered owner the beneficial interest must devolve as if the lands were personal estate. If they were personal estate, then, as I have said, they must be valued under sect. 6, and the respective rights of the widow and of the next-of-kin must depend on such valuation. This is the main difficulty in the case. When, however, we come to further consider sect. 85, we find that there are express provisions abrogating as regards such land "all existing rules of law and canons of descent," tenancy by the curtesy, and dower. The rights of the widow under the Act of 1890 do not depend upon "existing rules of law or canons of descent"; they are specific statutory rights conferred upon her in the most express terms, and if it had been intended by the Legislature to alter these statutory

rights, it would be reasonable to expect that this would have been done in express terms as in the case of descent, curtesy, and dower. It has often been held that general affirmative provisions of a later statute do not repeal the special provisions of an earlier Act; and this principle appears to me to afford the true solution of the question before us. In my judgment, there is nothing in the Act of 1891 to repeal the express provisions as to the mode of valuation with regard to real and personal estate laid down in sects. 5 and 6 of the Act of 1891, which remain in full force and effect.

MOLONY L.J.:—

The question submitted to the Court is whether lands which have been purchased under the provisions of the Land Purchase Acts, and registered under the provisions of the Local Registration of Title (Ireland) Act, 1891, should be valued, for the purposes of the Intestates' Estates Act, 1890, as realty under sect. 5, or as personalty under sect. 6 of the latter Act.

The scheme of the Act of 1890 is perfectly simple, and the Act seems to me to be particularly well drawn. Under sect. 1, if a man dies intestate and without issue, his entire estate, if not exceeding £500, belongs to his widow absolutely. Then we have to deal with the case of a man having more than £500, and sect. 2 provides that in such case the widow shall be entitled to £500 absolutely, and shall have a charge upon the whole of the real and personal estate for that sum. Sect. 3 then provides that in the case of a man dying possessed of both real and personal estate the widow's charge shall be borne in proportion to the values of such real and personal estate respectively, and this further necessitated the enactment of provisions regulating the valuation of the real and personal estates. We find, accordingly, that sects. 5 and 6 provide for the mode of valuation of the realty and personalty respectively. [His Lordship read the sections, and continued.] We have it then that, as regards both real estate and personal estate, a mode of valuation is prescribed, and must be followed in estimating the value of such estates, respectively, for the purposes of the Act, and the question in this case is whether the lands in question should be regarded as realty, to be valued in

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accordance with the provisions of sect. 5, or as personalty, to be valued in accordance with the provisions of sect. 6.

In my judgment, although land which had been purchased under the Irish Land Purchase Code and registered under the provisions of the Act of 1891 vests under sect. 84 in the personal representatives or representative of the tenant-purchaser as if it were a chattel real vesting in them or him, and although on the death of the tenant purchaser intestate the beneficial interest devolves, under sect. 85, upon, and subject to the provisions of the Act, is divisible among the same persons as if it were personal estate, such land yet remains, for all other purposes, freehold land; and in this connexion I approve of and adopt the judgment of Meredith M.R. in *Longworth* v. *Campbell* (1). Admitting this, it is contended by the respondents that the effect of sect. 85 of the Act of 1891 is impliedly to repeal the provisions of sect. 5 of the Act of 1890. I cannot accept this view. Section 85 is a general provision, and cannot, in its true construction, have the far-reaching effect which it is sought to give to it. It may also well be contended that sect. 85 deals only with division under the Statute of Distributions, but that before one comes to consider any question of distribution, effect must be given to the clear provisions of the Intestates' Estates Act, 1890, which gives to the widow what has not inaptly been called by Mr. Wylie "a statutory gift," and prescribes the mode in which the gift is to be ascertained and apportioned.

As regards sect. 86 of the Act of 1891, I am satisfied, on the clear and persuasive argument of Mr. Wylie, that it does not affect the matter; and I am unable to agree with the decision of Barton J. in *Naughton* v. *Naughton* (2). I accordingly think that these lands ought, for the purposes of the Act of 1890, to be valued as realty.

Solicitor for the plaintiff: *C. J. P. Farrell.*
Solicitor for the defendant: *P. J. Hannon.*

R. ST. J. C.

(1) [1910] 1 I. R. 32.

(2) [1910] 1 I. R. 363.

IN RE O'HARE.

MADDEN *v.* M'GIVERN.

Appeal.
1918.
Oct. 31.

The Court of Appeal (1) have affirmed the decision of O'Connor M.R. in this case, reported ante, page 160.

(1) Before SIR J. CAMPBELL C., and RONAN and MOLONY L.JJ.

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ADMINISTRATION — PRIORITY OF DEBTS—Right of Receiver appointed by the Court to indemnity—*Executor empowered to carry on business—Executor's right to indemnity—Rights of creditors of executors and creditors of receiver—Priority.*] The business of a testator was carried on pursuant to a direction in his will through the agency of his widow, and subsequently by a receiver appointed by the Court in an action to administer his estate. Debts were incurred by his executors and by the receiver in carrying on of the business, and the assets realized were deficient. *Held*, that the receiver was entitled to indemnity out of the assets against the debts incurred by him in priority to the executors, and that the creditors of the receiver had, by subrogation to his rights, priority over the creditors of the executors. *Healy, deceased*; *Healy* v. *Oliver* . . M. R. 366

ADMINISTRATION — Registered freehold land—*Valuation under Intestates' Estates Act, 1890—Realty or personalty—Local Registration of Title (Ireland) Act*, 1891 (54 & 55 *Vict. c.* 66), *ss.* 85, 86—*Intestates' Estates Act*, 1890 (53 & 54 *Vict. c.* 29), *ss.* 1, 5.] Freehold registered land to which Part IV of the Local Registration of Title (Ireland) Act, 1891, applies, is, for the purposes of the Intestates' Estates Act, 1890, real and not personal estate, and should accordingly be valued as such under the provisions of sect. 5 of the latter Act. *Farrelly* v. *Farrelly* . . . . APP. 488

1. ANNUITY charged on real estate—*Estate tail by implication—Wills Act, s.* 29—*Implication of cross-remainders—Proviso for ultimate merger "failing such issue"—Issue taking as purchasers—Issue read as heirs of the body—Course of descent—Reference to ancestor—Accrued shares—Estate tail in annuity barred—Subsequent duration—Base fee—Power of appointment to issue—Validity of exercise of.*] *E. L.* by her will devised and bequeathed her property, real and personal, to trustees upon trust

ANNUITY—*continued.*
to pay to each of her sons, *J.*, *A.*, *R.*, and *H.*, as they should attain the age of twenty-one years, or to such of them as should be living at her death, or if dead to their lawful heirs, an annuity of £45 each, and to each of her daughters, *M.*, *J.*, *E.*, and *F.*, as they should attain the age of twenty-one years, or to such of them as might be living at the time of her death, or, if dead, then to their lawful heirs, an annuity of £35 during their natural lives respectively, and to their lawful heirs after their death. She directed that in case any of her sons should die without lawful issue or failing such issue the annuities of such of her sons so dying should go and be divided in equal shares amongst their then surviving brothers and their lawful issue and the lawful issue of any other of her said sons previously deceased; and in case any of her said daughters should die without lawful issue or failing such issue, that the annuities of such of her daughters so dying should go and be divided in equal shares amongst their then surviving sisters and their lawful issue and the lawful issue of any other of her said daughters then previously deceased. In the event of the death of all of her said sons and daughters without lawful issue or failing such issue she directed that the annuities should cease and become merged in the lands. The will also contained a prohibition against alienation of the annuities and a provision for forfeiture in that event. The testatrix directed her trustees to permit her eldest son *J.*, his heirs and assigns, to receive the rents and profits of the lands during his life subject to the annuities, and after the termination of that estate upon trust for his lawful issue as he should by deed or will appoint, and in default of appointment, amongst such issue in equal shares, and in case of his death without issue or failing such issue, to her other sons in succession subject to like limitations. *R.* and *A.* predeceased *J.* and *H.*, and died unmarried, and their annuities were paid in moieties to *J.* and *H.* *J.* executed a disentailing deed barring the estate tail he was considered to have in the annuities. *J.* by his will left all his property which he should die seised or possessed of and

ANNUITY—*continued.*

which he was competent to dispose of or over which he had a disposing power upon trust to pay the rents and profits of his real estate to his wife during her life, and after her death to divide the same amongst his four children in equal shares, and give power to his trustee after the death of his wife to sell the real estate for purposes of division. *J.* died in 1900, leaving issue the four children named in the will, and grand-children. *H.* died in 1916 unmarried. Two of the daughters, *J.* and *E.*, died without issue. *M.* and *F.* died leaving issue, and the annuities of *J.* and *E.* were paid to them. The issue of *M.* failed. *F.* had issue living one child, *J. P.* An originating summons was taken out by the trustees of the will of *E. L.* to determine who was entitled to the annuities and the lands. *Held*, 1. That notwithstanding sect. 29 of the Wills Act, each of the sons of the testatrix took an estate tail by implication in the annuity given to him by the will. 2. That on the death of a son without issue his annuity went to his surviving brother in tail and to the heir of the body of a predeceased brother in tail in equal shares, issue being construed as heirs of the body. 3. That the accrued shares of the annuities went over in the same way as the original annuities, cross remainders in tail being implied, and that on the death of *H.* his annuities, original and accrued, went to the heirs of the body of *J.* 4. That the annuities of the daughters were given in the same way in tail with cross remainders in tail; and that all their annuities went by the implied limitations of cross remainders to *J. P.* 5. That as the annuities were rent-charges created de novo in tail, the effect of a disentailing assurance was only to give a base fee, and that the annuities were not perpetual, and would only last as long as there was issue capable of inheriting them. 6. That the word "issue" in the devise of the lands to the eldest son for life and after his death to his issue was to be read as a word of purchase, and that he took a life estate only in the lands with remainder in fee to his issue as purchasers in equal shares in default of appointment. 7. That the will of the eldest son was a valid exercise of the power of appointment created by the will of the testatrix. The rule in *Mandeville's Case*, Co. Litt. 26 *b*, as explained in *Vernon* v. *Wright*, 7 H. L. C. 35, applied. *Loughead, deceased*; *Hamilton* v. *Loughead*. [M. R. 227

2. **ANNUITY—Express trust**—*Lands charged in exoneration of other lands—Redemption of annuity—Real Property Limitation Act* (3 & 4 *Wm.* 4, *c.* 27), *ss.* 2, 25.] By his will, made in 1770, *A.M.* devised all his estates subject to legacies to trustees in trust to pay certain legacies and annuities, and subject thereto to *A.S.* for life, with remainder in tail male to his first and other sons, with remainders over. By a first codicil deceased left to other trustees a sum of £20 per annum, payable out of the testator's lands of Grange, in trust for certain poor men and poor widows therein described. By a second codicil, deceased, having recited the devise in his will, revoked the remainders and limitations therein mentioned, and devised his freehold estates to *A.S.*, his heirs and assigns, for ever, and in other respects confirmed his will and first codicil. *A.S.* predeceased the testator, leaving no issue, and on the latter's death his three daughters took as co-heiresses. A partition deed was executed in 1781 by them and their respective husbands, reciting (inter alia) the creation of the annuity of £20; and the lands charged therewith were thereby assured to *M.* (one of the daughters) subject to the said annuity. In 1880 portion of the lands of the objector (the successor in title of *M.*) were sold in the Land Judge's Court in twenty-four lots, and lot 24 (being the lands now sold) was sold liable to pay the annuity in exoneration of the other lands; and by a Land Judge's conveyance lot 24 was conveyed to the purchaser subject to the annuity in exoneration of the other lands sold. In 1908 certain other lands belonging to the objector and derived from *M.* were sold, and, the annuity having been placed on the schedule with a denial of liability, the Commissioners of Charitable Donations and Bequests lodged an objection which was allowed; but the present vendors were not parties, and were ignorant of the application. The annuity was never paid at any time. *Held*:—*First*, that the vendors not being parties to the decision given in 1908 were not bound by it. *Secondly*, that the annuity was secured by an express trust within the meaning of 3 & 4 Wm. 4, c. 27, s. 25, and consequently was not barred. *Thirdly*, that the words used in the second codicil only affected the devise to *A.S.*, giving him an estate in fee instead of in tail. *Fourthly*, that it was immaterial that the trustees to whom the estate was devised, and those who were to distribute the annuity, were different persons. *Fifthly*, that the person whose money was applied in redemption of the annuity stepped into the shoes of the annuitant, and that therefore it was not necessary that the claim for contribution should have been made within six years from the date of the payment of the redemption moneys. *Givans's Estate* - - - - - Ross J. 68

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See MARSHALLING.
—— Dublin police rate - - - 371
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APPROPRIATION and payment in respect of charges in equal priority - - 420
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ARREARS OF INTEREST on charge—Solvency as to income - - 446
See LAND PURCHASE ACTS—BONUS.

ARREARS OF JOINTURE—Interest on 259
See INTEREST.

ASSIGNMENT—*Chose in action—Notice—Right to sue—Equitable assignment—Judicature Act (Ireland)*, 1877 (40 & 41 *Vict. c.* 57), *s.* 28, *sub-s.* 6—*Trading with the Enemy Amendment Act*, 1914 (5 *Geo.* 5, *c.* 12), *s.* 6.] An Austrian firm was indebted to a London firm in the sum of £3101 at the commencement of the war between Great Britain and Austria. On September 25th, 1914, the Austrian firm wrote a letter purporting to be an assignment to the London firm of a debt of £518 due to them by *B.*, the deceased, whose estate was being administered. That letter contained an enclosure signed by the Austrian firm addressed to *B.*, amounting to a notice of assignment of the debt. That enclosure was kept by the London firm till the following December, when they forwarded it to *B. Held*, that as the transaction of 25th September, 1914, amounted to a valid equitable assignment of a chose in action for valuable consideration, it was not illegal as contravening section 6 of the Trading with the Enemy Amendment Act, 1914 (5 Geo. 5, c. 12), and that the fact that the London firm had no right to sue in their own name till December did not prevent them from proving against the estate of *B.* for the debt due by him to the Austrian firm. Section 28 of the Judicature Act, 1877, does not affect the right of an equitable assignee of a chose in action, but merely affects the procedure enabling an assignee to sue in his own name at law. *Grundy* v. *Broadbent*
[O'CONNOR J. 433

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BANK MORTGAGE—Deduction of income tax from interest accrued since half-yearly rent - - - - - - 30
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CASES—*Arbib and Class Contract* ([1891] 1 Ch. 601) followed - - 347
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—— *Archer's Estate* ([1914] 1 I. R. 285) not followed - - - - - 338
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—— *Bomore Road, In re* (No. 9) ([1906] 1 Ch. 359, followed - - - - - 356
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—— *Chesham's Settlement, Re* ([1909] 2 Ch. 329) followed.
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—— *Coolmoyne Society* v. *Bulfin* ([1917] 2 I. R) 107) applied - - - 313, 323
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—— *Hickman* v. *Upsall* (4 Ch. Div. 144) applied. [95
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—— *R.* (*Belfast Corporation*) v. *Belfast Poor Law Guardians* ([1917] 2 Ir. 443 *n*) overruled - - - - - - 371
See DUBLIN POLICE DISTRICT—POLICE RATE.
—— *Shaw* v. *Ford* (7 Ch. D. 669) distinguished. [160
See WILL—ABSOLUTE BEQUEST.
—— *Thompson's Estate, In re* ([1912] 1 Ir. R. 466) not applied - - - - - 446
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—— *Vernon* v. *Wright* (7 H. L. C. 35) applied
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CHARGEANT IN POSSESSION—Account by - - - - - - - 95
See LIMITATIONS, STATUTE OF—REALTY. 2.

CHARITY — GIFT TO—Charitable purpose not specifically impressed—*Bequest to College of Surgeons—Objects of College—Legacy payable out of realty* (7 & 8 *Vict. c.* 97), *s.* 16.] A testatrix devised and bequeathed all her property

CHARITY—*continued.*

to her trustees upon trust for sale, and for the payment of legacies, including a legacy of £500 "to the Royal College of Surgeons in Ireland." The testatrix died four days after the execution of her will, leaving real and personal estate. *Held*, that as the College of Surgeons was incorporated with two main objects, namely, the promotion of the science of surgery, and the promotion of the interests of those practising the profession of surgery, the latter not being a charitable object, and as the testatrix did not specifically impress her gift with a charitable purpose, the bequest was not one for charitable uses within the meaning of 7 & 8 Vict. c. 97, s. 16, and was accordingly not void though in part payable out of realty. *Miley* v. *Attorney-General and Rooney* - App. 455

COLLEGE OF SURGEONS, ROYAL—Bequest to - - - - - - 455
See CHARITY—GIFT TO.

COMPANY — WINDING UP — Unauthorized petition by directors—*Impossibility of carrying on business—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *sect.* 129 (vi)—*Companies Clauses Act*, 1845 (8 & 9 *Vict. c.* 16), *sect.* 90.] The directors of a company are not entitled, without the authority of a general meeting of the shareholders, to present a winding-up petition in the name of the company. But where directors have presented a winding-up petition in the name of the company without authority, it is open to a general meeting of the shareholders to ratify their action. *In re Galway and Salthill Tramways Co.* - - M. R. 62

CONDITION SUBSEQUENT—Non-performance forfeiture - - - 126
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CONGESTED DISTRICTS BOARD — Resumption of part of holding for migration and enlargement of holdings. - 116
See LAND LAW ACTS—RESUMPTION BY LANDLORD.

CONSIDERATION—Valuable - - 169
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CONVEYANCE by person appointed on behalf of person of unsound mind - 453
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COVENANT TO REPAIR — Loss by fire — Fire insurance—Subrogation - 152
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DAMAGES—Measure of—Breach of covenant to repair - - - - - 152
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DECEASED WIFE'S SISTER — Issue of marriage with—Right to share in residue with issue of former marriage - 394
See WILL—LAPSE.

DEED — Intention to defeat future Purchasers—Onus of proof—10 *Chas.* 1, *sess.* 2, *c.* 3 (*Ir.*)—*Voluntary Conveyances Act*, 1893 (56 & 57 *Vict. c.* 21)—*Valuable consideration.*] By indenture, made the 11th October, 1888, *J. M.* purported to convey to the defendants *J. K.* and *C. M.* part of the lands of *F.* upon trust to pay the income to the said *J. M.* for life, and after his death for *C. M.* absolutely. *J. M.* also granted to *R. M.*, his wife, if she should survive him, a rentcharge of £40 per annum, and charged the lands with sums, amounting in all to £750, for each of his three daughters and his four sons, to be payable on the death of *J. M.* *C. M.* thereby covenanted with *J. M.* in the event of any of *J. M.*'s daughters getting married, to pay the sums therein mentioned, to be charged for her or their respective benefits, to be given credit for against her or their respective charges. By a marriage settlement, made the 14th September, 1901, which recited the indenture of the 11th October, 1888, and stated, contrary to the fact, that all the charges on the lands of *F.* had been paid off, the said lands were conveyed by *J. M.* to *C. M.*, and *J. W.*, his intended wife. This deed recited the intention to make provision for the payment to *J. M.* of *J. W.*'s fortune of £300. The defendants alleged that in October, 1888, *J. M.* was in embarrassed circumstances, and that the indenture of 1888 had been executed with the object of hindering and defeating a particular creditor, *C.*, that the deed was never acted upon, and was never intended to be acted upon. *J. M.* died on the 25th March, 1909. This action was brought to raise the charges for *J. M.*'s sons and daughters. *Held*, by the Court of Appeal (affirming the judgment of the Master of the Rolls), that there was no evidence from which the Court could infer any intention to defeat *C.* or any other creditor of *J. M.*; that the onus of showing that the deed of 1888 was executed mala fide lay on the defendants, and that the plaintiffs were not bound affirmatively to prove that the deed of 1888 had been executed bona fide. *Held* also, assuming that the deed of 1888 was voluntary, that it was not open to the defendants to rely on the protection given to a creditor under the statute 10 Chas. 1, sess. 2, c. 3 (Ir.) (corresponding to 27 Eliz. c. 4), and that there was no evidence of intent to hinder or defeat any future purchasers. The 10 Chas. 1, sess. 2, c. 3 (Ir.), remains in operation to prevent fraud of the character described in the statute; but a presumption of fraudulent intent has been got rid of by the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), which has cast the onus of showing

DEED—*continued.*
that a deed has been executed mala fide on the person alleging it. *Held*, per Ronan L.J., that the deed of the 11th October, 1888, was not voluntary, but executed for valuable consideration, namely, the covenant by *C. M.* to pay the sums on marriage to *J. M.*'s daughters. *Moore* v. *Kelly, Moore, and Others* - - APP. 169

DEFAMATION—Libel—Words uttered in course of judicial proceedings—*County Court Judge—Recorder—Privilege—Reasonable cause of action—Immunity from action.*] An action does not lie against a judge of a Court of Record for anything done by him as a judge in a judicial proceeding. A county court judge or a recorder is within the privilege. The privilege is not for the individual, but for the sake of the public, and the advancement of justice. And if impleaded he should rely on his privilege. An added allegation of malice does not make the action maintainable. The privilege extends to words spoken as well as to things done. A Court of Equity has no jurisdiction to review what is done by a judge as a judge. On a motion to stay such an action on the ground that (*a*) the action is frivolous and vexatious, and (*b*) that it discloses no ground of complaint, the Court may decline to decide that it is frivolous and vexatious, and may make an order dismissing the action as if on demurrer. *Tughan* v. *Craig* - - - - DODD J. 245

DESCENT of Estate Tail—Issue taking as purchasers - - - - - - 227
See ANNUITY. 1.

DIRECTORS OF COMPANY—Petition for winding-up by, unauthorized by company - - - - - - 62
See COMPANY—WINDING-UP.

DISCHARGE OF EQUITIES on application of person not owner - - 170
See LAND REGISTRY. 1.

DISTRICT ASYLUM JOINT COMMITTEE ACCOUNTS—Audit fee - 211
See LOCAL GOVERNMENT—AUDIT.

DUBLIN POLICE DISTRICT — POLICE RATE—Apportionment *between county borough and outside area—Local Government (Ireland) Act*, 1898 (60 & 61 *Vict. c.* 37), *sect.* 65, *sub-s.* 2; *sect.* 66.] Under the Dublin Police Acts, as amended by the Local Government (Ireland) Act, 1898, sect. 66, sub-ss. 2 and 4, the Commissioner of Police is entitled to raise for the maintenance of the police force an amount not exceeding eightpence in the pound on the annual value of the rateable hereditaments in the police district, which is apportionable between the city of Dublin and the rest of the district according to rateable value.

DUBLIN POLICE DISTRICT—*continued.*
Sect. 65, sub-s. 2, of the Local Government (Ireland) Act, 1898, provides that, where part of a union is within and part without any county borough, a revaluation whereof has been made under sub-s. 1 of that section, the total amount to be raised for union charges shall be apportioned between each such part in proportion to the rateable value of each part "at the date when the revaluation under this section came into force." This enactment is by the sub-section applied to the said police district as if it were a union. Pursuant to sect. 65, sub-s. 1, of the Act of 1898, a revaluation of the county borough of Dublin was made by which the total valuation of the rateable hereditaments in the borough was largely increased. This revaluation came into force on April 1, 1916. *Held*, that the provisions of sect. 65, sub-s. 2, as to apportionment apply to the Dublin Police District in respect of police rate; but *held*, reversing the decision of the Court of Appeal ([1917] 1 I. R. 423), which had affirmed the judgment of O'Connor M. R. (ib. p. 40), that the Commissioner of Police in estimating and apportioning the amount necessary for the maintenance of the police force is bound to have regard to the valuation of the city of Dublin as it existed at and immediately after the date when the last previous general revaluation of the city under section 65 of the Act of 1898 came into force, subject to the cases mentioned in the proviso to sub-section 2 of that section. *Belfast Guardians* v. *Belfast Corporation* ([1910] 2 I. R. 534), and *Rex* (*Belfast Corporation*) v. *Belfast Poor Law Guardians* ([1917] 2 I. R. 443 *n*), overruled. *Attorney-General for Ireland* v. *Dublin Corporation and Dublin County Council* - - - H. L. 371

EMERGENCY LEGISLATION -
See WAR—EMERGENCY LEGISLATION; and *see* PRACTICE—COURTS (EMERGENCY POWERS).

EQUITABLE ASSIGNMENT - 433
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EQUITABLE ESTATE IN REALTY—No words of limitation - - 1
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—— Course of descent — Issue taking as purchasers - - - - - - 227
See ANNUITY. 1.

—— in annuity—Barred—Duration - 227
See ANNUITY. 1.

ESTOPPEL.
See LANDLORD AND TENANT — SURRENDER.

EXECUTOR—Indemnity of, for debts incurred in carrying on business of testator—Priority [366

See ADMINISTRATION — PRIORITY OF DEBTS.

EXECUTOR—Negligence *amounting to wilful default.*] Testatrix left £150 to her cousin, "*J. G.*, of Vancouver, B.C." *J. G.*'s sister having informed the executors that his address was "Portland, Oregon, U.S.A.," they despatched a banker's draft to *J. G.* to that address without further inquiry. The money having got into the hands of the wrong person: *Held*, that the executors had not acted with that care that might reasonably be expected from a careful man in the prudent discharge of his own business; that they were consequently guilty of negligence amounting to wilful default; and that they must make good the loss out of their own pockets. *Gunning, deceased*; *Little* v. *The Governors of the County Down Infirmary* - - - - - - ROSS J. 221

EXPRESS TRUST—Annuity charged on lands—Statute of Limitations - 68
See ANNUITY. 2.

EVIDENCE—Presumption of presentment by Grand Jury to stop up road - 402
See HIGHWAY.

FIRE INSURANCE—Loss by fire—Covenant to keep in repair—Subrogation - 152
See LANDLORD AND TENANT—LEASE.

FOREIGN INFANT—Guardian - - 19
See PRACTICE—JURISDICTION.

FRAUD ON SETTLEMENT—Holding purchased under Land Purchase Acts *by limited owner—Sale by Irish Land Commission to recover arrears of annuity—Collusion between owner of holding and purchaser at sale—Purchaser declared a trustee for persons entitled to remainder.*] *J. H.* and *H. H.* (his wife) being entitled under a settlement executed on their marriage to a farm of land held under a tenancy from year to year for their joint lives, purchased the fee-simple of the lands under the Land Purchase Acts in 1888, and were subsequently registered as limited owners under the provisions of the Local Registration of Title (Ir.) Act, 1891. With a view to defeating the interests of those entitled in remainder under the settlement, *J. H.* and *H. H.* deliberately allowed the annuity payable to the Irish Land Commission to fall into arrear, and on the lands being put up for sale by the Irish Land Commission, any outside bidding was prevented, and the defendant (a nephew of *H. H.*), who was privy to the entire transaction, was declared the purchaser at the sale for a price which was only sufficient to pay the

FRAUD ON SETTLEMENT—*continued.*
arrears of the annuity and did not represent the true selling value of the farm. The plaintiff represented those entitled in remainder under the settlement. *Held*, by the Court of Appeal (affirming the decision of the Master of the Rolls), that the defendant was party to a fraud on the settlement, and could not retain for himself the benefit of the purchase. *Hahesy* v. *Guiry* [APP. 135

GIFT OVER intended to prevent exercise of legal right—Invalidity - - 160
See WILL—ABSOLUTE BEQUEST.

GUARDIAN, appointment of, for registered owner, being a lunatic not so found 417
See LAND REGISTRY. 2.

—— Income of infant paid to American corporation, appointed guardian by competent American court - - - 19
See PRACTICE—JURISDICTION.

—— Remuneration of foreign, under order of competent foreign court - - 19
See PRACTICE—JURISDICTION.

HEIRLOOMS—Trust of chattels as — *Construction — To be enjoyed with mansion house — Tenant in tail—Vesting—Intention—Actual possession.*] A mansion house and demesne were settled by will in 1858 to the use of the testator's son *S. D.* for life, and after his death to the use of such son of *S. D.* as he should appoint, and in default of appointment to the use of the first and every other son of *S. D.* successively in tail male. The testator bequeathed to trustees all the plate, pictures, books, and prints at the time of his death in the mansion house upon trust to permit the same to be enjoyed with the mansion house so far as the rules of law and equity would admit by the person who for the time being should be entitled to the possession of the mansion house by virtue of the will. The testator bequeathed the residue of his personal estate to *S. D.* *S. D.* went into possession of the mansion house and demesne on the death of the testator. *S. D.* had two children, a son *J. S. D.*, and a daughter *A*, who married *P. S. D.* and *J. S. D.* disentailed the estate, and afterwards appointed that the mansion house and demesne should go to and remain to the use of *S. D.* for life, and after his death to his daughter *A.* during her life, with remainders over to her issue. *S. D.* died in 1915, having appointed *A.* his executrix and residuary legatee. She went into possession of the mansion house, demesne, and chattels. *J. S. D.* claimed the chattels as tenant in tail under the will of *S. D.* *Held*, by the Court of Appeal, affirming the decision of O'Connor M.R., that the intention of the testator

HEIRLOOMS—*continued.*
was that the chattels should go to the person who should have actual possession of the mansion house, and not to the person who, in events which had not happened, would have become entitled to actual possession, and that *A.* was entitled to the chattels. *Re Chesham's Settlement*, [1909] 2 Ch. 329, followed. *Duckett, Deceased; Phillpotts* v. *Fitzmaurice* - - - M.R. APP. 110, 115

HIGHWAY—Presumption of presentment by Grand Jury—*Power to stop up road—New or substituted highway—Grand Jury Act*, 1836 (6 & 7 *Wm.* 4, *c.* 116), *sect.* 60.] The defendants as a defence to an action for trespass set up a public right of way. The evidence showed that if any such public road ever existed, it had been stopped for over sixty years, and the public excluded therefrom, and a new road made. *Held*, that the Court might and ought to presume a presentment by the Grand Jury stopping up the old road. *Representative Church Body* v. *Barry* [DODD J. 402

INCOME, calculation of, from lands in hands 446
See LAND PURCHASE ACTS—BONUS.

INCOME TAX—Deduction from interest on bank mortgage - - - 30
See LAND PURCHASE ACTS—PRACTICE.

INDEMNITY of Receiver appointed by Court [366
See ADMINISTRATION — PRIORITY OF DEBTS.

INDUSTRIAL AND PROVIDENT SOCIETY—Rules—Restraint of trade—*Rules alleged to be ultra vires—Prohibition of competition—Public policy—Arbitration—Industrial and Provident Societies Act*, 1893 (56 & 57 *Vict. c.* 39).] The plaintiff in the year 1903 became a member of the defendant society, one of the rules of which prohibited the sale of milk to any creamery other than the defendant's creamery without the consent in writing of the committee, under the penalty of forfeiture of shares. In the year 1915, the defendant society, under powers contained in the rules, altered the rule as to the sale of milk, the altered rule being in increased restraint of trade, and the language of the rule being identical with that of the rule the validity of which was established in the *Coolmoyne Society* v. *Bulfin* ([1917] 2 I. R. 107). The plaintiff objected to the alteration of the rule, and subsequently impeached its validity in this action. *Held*, by the Court of Appeal (reversing the decision of Barton J.), that the rule was binding on the plaintiff. *M'Ellistrim* v. *The Ballymacelligott Co-Operative Agriculture and Dairy Society (Limited). No.* 2
[BARTON J. 313; APP. 323

INTEREST—On arrears of jointure *charged on lands sold under the Land Purchase Acts—Death of jointress long prior to sale.*] Under a marriage settlement, a jointure, charged on the settled lands, became payable to the wife on the death of the husband in 1880. The wife died in 1897. The jointure was then heavily in arrear. By her will she bequeathed the arrears to her daughter-in-law. Payments on account of the arrears were made from time to time by the agent for the owner of the lands. The lands were subsequently sold under the Land Purchase Acts. The amount due for arrears was in dispute, but, on the vouching before the Examiner, it was agreed between the parties to accept as the basis of calculation the amount shown to be due in 1909 by the ledger account of the agent. *Held*, that no interest was payable on the arrears. *Ussher's Estate* - - - - - WYLIE J. 259

INTESTATES' ESTATES ACT, 1890—Valuation of freehold registered land under - - - - - - - 488
See ADMINISTRATION.

ISSUE—Taking as purchasers - - 227
See ANNUITY. 1.

JOINT TENANCY—Gift of farm and chattels to wife to manage to best advantage of self and children - - - 429
See WILL—WORDS.

JOINT TENANTS—Residuary bequest to persons as - - - - - - 394
See WILL—LAPSE.

JOINTURE—Interest on arrears of - 259
See INTEREST.

JUDGE—Words uttered in course of judicial proceedings—Immunity - - 245
See DEFAMATION.

LABOURERS ACTS — Failure to make arrangements for erection of dwellings—*Lands taken compulsorily—Erection of labourers' dwellings within specified time—Right of owner of lands compulsorily taken to re-conveyance—Labourers (Ireland) Act*, 1883 (46 & 47 Vict. *c.* 60, *s.* 15).] The defendant council obtained a provisional order, dated the 24th July, 1912, authorizing them to acquire compulsorily for the erection of labourers' dwellings (inter alia) certain lands of the plaintiff, which order was confirmed by the Local Government Board on the 27th September, 1912. An executed deed of transfer of the plaintiff's lands was delivered to the defendants on the 19th December, 1913. On the 22nd January, 1914, the defendants issued advertisements inviting tenders for the erection of the dwellings, but received no tenders for the erection of the dwellings to be erected on the lands acquired

LABOURERS ACTS—*continued.*

from the plaintiff, and further advertisements, published on the 8th February, 1914, 4th March, 1914, and 6th January, 1915, also resulted in no tenders being made. An advertisement, however, published on the 5th February, 1914, asking for tenders for the fencing of the plaintiff's lands, produced a tender, and the fencing of the lands was completed in the month of April, 1914. No further steps were taken by the plaintiffs, and on the 18th February, 1916, the plaintiff issued an equity civil bill, claiming the re-conveyance of the lands acquired from him. On the hearing of a case stated, *held*, by the Court of Appeal (Ronan and Molony L.JJ., the Lord Chancellor diss.), that the defendants had failed to make arrangements for the erection of the dwellings within sect. 15 of the Labourers (Ireland) Act, 1883, and that the plaintiff was entitled to a re-conveyance. *Acheson* v. *Cavan Rural District Council* . APP. 76

LAND LAW ACTS—RESUMPTION—Congested Districts Board—*Migration and enlargement of holding—Land Law (Ireland) Act*, 1881, *sect.* 5, *sub-s.* 6; *Irish Land Act*, 1903, *sect.* 83.] Section 83 of the Irish Land Act, 1903, does not empower the Court to authorize the resumption by the Congested Districts Board of part of a holding for the purposes of migration or the enlargement of holdings. *Congested Districts Board for Ireland* v. *O'Donnell* - - - - - - APP. 116

LAND PURCHASE ACTS — BONUS—Solvency of estate as to income—*Arrears of interest on charge—Income of demesne lands—Irish Land Act*, 1903 (3 *Ed.* 7, *c.* 37), *s.* 48, *sub-s.* 1.] In ascertaining whether an estate sold under the Land Purchase Acts is solvent as to income, within the meaning of the proviso sect. 48, sub-s. 1, of the Irish Land Act, 1903, the rule is that, if on comparing the annual income which the vendor was entitled to receive with the annual outgoings which he was liable to pay at the date of sale, the former exceeds the latter, he is entitled to the bonus, notwithstanding the fact that there may be an accumulation of antecedent arrears of a charge. *In re Thompson's Estate* ([1912] 1 I. R., p. 466, note) applied. In calculating the income derived from the estate, the vendor is entitled to include as profit income the amount of the poor law valuation of demesne and other lands in hands. *Gun Cunningham Estate* [WYLIE J. 446

LAND PURCHASE ACTS—PRACTICE—Deduction of Income Tax—Interest *accrued since last half-yearly rest—Claim under bank mortgage affecting purchase-money—"Yearly interest"—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *sect.* 102—*Income Tax Act*, 1853 (16 & 17 *Vict.* **LAND PURCHASE ACTS**—*continued.*

c. 34), *sect.* 40.] Where a claim is vouched under an ordinary bank mortgage, affecting the purchase-money of lands sold under the Land Purchase Acts, for principal and interest accrued since the last half-yearly rest, income tax will not be deducted from such interest, even after the death of the vendor who created the mortgage. *Young's Estate* - - - - WYLIE J. 30

LAND PURCHASE ACTS — SUPERIOR INTEREST — Redemption price—*Court of Appeal fixes the amount.*] On an application to redeem and fix the redemption price of a head rent of £48 14*s.* payable out of an undivided seventh of lands sold under the Land Purchase Acts and other lands, it appeared that the annual rental of the entire lands was £251 9*s.*; the poor law valuation £244 17*s.*, and the estimated cash value £3056. Wylie J. fixed the redemption price at £840. The Court of Appeal, being of opinion that the price so fixed was too high, fixed the price at £600. *Kneeland and Revell's Estate* [APP. 414

1. LAND REGISTRY—Discharge of Equities—*Application by person other than the registered owner—Jurisdiction of Registrar—Practice.*] *O. S.* was registered under the Local Registration of Title (Ir.) Act, 1891, as owner in fee-simple (subject to equities) of lands purchased by him under the provisions of the Irish Land Purchase Acts. *P. S.* claimed that the interest purchased by *O. S.* was a graft upon his former interest in the lands, and that by virtue of certain instruments of title executed prior to the purchase he (*P. S.*) was entitled to an absolute interest in remainder in the lands subject to the life interest therein of his mother, and to a mortgage affecting the lands. He accordingly applied to the registrar to investigate the title to the lands, to ascertain and enter on the register the burdens (if any) affecting the land and to cancel the note as to equities. *O. S.* refused to consent to the application, and denied the jurisdiction of the registrar to entertain it. *Held*, by the Court of Appeal (Ronan and Molony L.JJ., Sir I. J. O'Brien C. diss.), affirming the decision of Madden J., that the registrar had general jurisdiction under the Act to complete the register, and that it was competent for him to entertain the application. *Re Smith* - - - APP. 45

2. LAND REGISTRY—Practice—Registered owner a lunatic not so found—*Execution of transfer by Committee—Appointment of guardian—Lunacy Regulation (Ireland) Act*, 1871 (34 *Vict. c.* 22), *ss.* 68 *and* 69; *Local Registration of Title (Ireland) Act*, 1891 (54 & 55 *Vict. c.* 66), *s.* 75 *sub-s.* 2.] The appointment of a guardian under *s.* 75, sub-s. 2, of the Local Registration of Titl

LAND REGISTRY—*continued.*

(Ireland) Act, 1891, is not necessary for the purpose of executing a transfer of registered land, the owner of which is a person of unsound mind not so found by inquisition, a committee of his estate having been appointed by the Lord Chancellor. Such committee is a fit and proper person to execute such transfer. *Re Murphy*

[Ross J. 417

3. LAND REGISTRY—Registered land—Subdivision without consent of Land Commission—*Local Registration of Title (Ireland) Act*, 1891 (54 & 55 *Vict. c.* 66, *sects.* 35, 38—*Registration of title of subdivided portion.*] The owner of land registered under the Local Registration of Title (Ireland) Act, 1891, subject to a purchase annuity, assigned portion thereof to a transferee without the consent of the Land Commission. *Held*, reversing the decision of Ross J., [1917] 1 I. R. 361, that the transferee was entitled to have his title to the land so transferred registered under the Act, but that such registration would not affect the overriding power of sale conferred upon the Land Commission in such case. *In re Geoghegan*

[APP. 188

4. LAND REGISTRY—Sale by personal representative—*Land Registry Orders and Rules*, 1910; *Order* 4, *rules* 4 *and* 5—*Full money consideration.*] *J. F.*, a registered owner of land, died intestate, leaving *M. F.*, his widow, and a number of children his next-of-kin him surviving. *M. F.* took out a grant of administration to the personal estate of *J. F.*, and subsequently executed a deed of transfer of the registered lands to her eldest son, *T. F.*, in consideration of a sum of money acknowledged as paid to *M. F.* by *K. B.* "by way of fortune on her marriage" with *T. F.*, and in consideration of certain rights of residence and maintenance reserved by the deed. The deed was executed by *M. F.* as personal representative of the deceased owner, and as beneficial owner of every estate and interest in the lands to which she was entitled. Certain of the children also joined in the deed to testify their consent to the assignment, but others of them, who were either abroad or minors, were not parties. *T. F.* married *K. B.*, and subsequently applied to be registered as transferee. *Held*, by the Court of Appeal, affirming the decision of Madden J., that the sale was not one by a personal representative for full money consideration within Order 4, rule 5, of the Rules of 1st September, 1910; that the Registrar of Titles was entitled to require the shares of all the next-of-kin to be accounted for, and to postpone the registration of the transfer until these rules were complied with. *In re Fitzmaurice Estate* - - - - - - - APP. 33

LANDLORD AND TENANT — LEASE—Covenant to repair—*Loss by fire—Measure of damages—Defence of the Realm (Amendment) No. 2 Act*, 1915 (5 *Geo.* 5, *c.* 37), *sect.* 1, *sub-s.* 2—*Defence of the Realm Regulation* 8E—*Fire Insurance—Subrogation.*] Certain premises demised by *A* by lease of 1866, which contained a covenant by the lessee to keep the premises in repair. *A*, by a lease of 1883, containing a similar covenant, sub-demised the premises to *B*. *A* and *B* had each insured the premises against loss by fire. On the 24th January, 1915, the premises were burned down. Both *A* and *B* had been paid the full amounts of their respective claims by the Insurance Companies, which were not sufficient to reinstate the premises. *A* made a claim against the estate of *B* for damages for breach of the covenant to repair. *A*'s Insurance Company claimed to be subrogated to the rights against *B*'s estate, irrespective of whether *A* had been fully indemnified against the loss sustained or not. *Held*, that until the insured had been fully indemnified he was not bound to contribute anything to the Insurance Company. The measure of damages for breach of a covenant to repair where the premises have been totally destroyed, and the effect of the Defence of the Realm (Amendment) No. 2 Act, 1915 (5 Geo. 5, c. 37), sect. 1, sub-s. 2, and Regulation 8E made thereunder, considered. *In re Driscoll, deceased*; *Driscoll* v *Driscoll*

[M. R. 152

LANDLORD AND TENANT — SURRENDER *by act and operation of law—Lease for ever—Estoppel.*] To constitute a surrender by operation of law there must be (1) an act of purported surrender invalid per se by reason of non-compliance with statutory or other formalities, and (2) some change of circumstances supervening and arising from the purported surrender which, by reason of the doctrine of estoppel or part performance, makes it inequitable for any of the parties to rely upon the invalidity of the purported surrender. *K.*, a lessee of lands for ever at a yearly rent, signed a document giving her husband *C.* authority to have his name entered on the rent receipt. The same day *C.* sent the document to the landlords, who, at his request, inserted *C.*'s name in their books. *C.* thereafter paid the rent. *K.* subsequently repudiated the document, and devised the lands to the plaintiffs. *Held*, that *C.* had acquired no title in the lands. *Glynn* v. *Coghlan* O'CONNOR J.

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LIMITATIONS—No words of—Equitable estate in realty - - - - - 1
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1. LIMITATIONS, STATUTE OF—REALTY—*Right to recover rent accrued after extinction of title to tenancy*—3 & 4 *Wm.* 4, *c.* 27, *ss.* 3, 34; 37 & 38 *Vict. c.* 37, *s.* 1; 23 & 24 *Vict. c.* 154, *s.* 14.] *A.* became owner by assignment in 1900 of a tenancy from year to year, and paid the rent due to his landlord until his death in 1914. During the whole of that period he had allowed *B.* to remain in possession of the premises without paying any rent or giving any acknowledgment of *A.*'s title. The landlord having made a claim in the administration of *A.*'s estate for rent accrued due subsequent to his death: *Held*, 1 (by the Court of Appeal, reversing the decision of O'Connor M.R. on this point), that the landlord was not entitled to recover any rent which accrued after *A.*'s interest had been destroyed by force of the Statutes of Limitation; 2 (by O'Connor M.R. and the Court of Appeal), that the tenancy did not form part of *A.*'s assets. *Field, dec.*; *Fields* v. *Field* APP. 140

2. LIMITATIONS, STATUTE OF—REALTY — Infant — Bailiff — *Mortgagee in possession—Express trust—Mistake of Law — Mortgagee of tenant for life overholding—Account of Rents and Profits—Plea of compromise and plene computavit.*] Defendant was entitled, under the will of her father *F.*, to a paramount equitable charge upon lands devised to her brother, who by two legal mortgages mortgaged some of the lands, which were subject to the charge, to defendant to secure money due to her. In 1895, by agreement with her brothers, defendant entered into possession of the lands for the purpose of paying herself arrears of interest and current interest on the paramount charge and on the two mortgages. She applied the rents and profits in payment of the interest on the charge, which was always paid in full, and the surplus rents and profits towards paying the interest on the two mortgages, for which purpose they were not sufficient. In 1904 the surviving brother died. All the parties believed that the brothers had been seised in fee of the mortgaged lands, and as the interest on the mortgages was largely in arrear the defendant was allowed to continue in possession under that mistaken belief until June, 1914, when it was discovered that the defendant's brothers had been entitled for life only, and that the plaintiff, who was defendant's nephew, under *F.*'s will, had been entitled in fee in remainder since 1904. In 1904 plaintiff was an infant; but defendant was not his guardian, and did not stand in a fiduciary relation towards him. He came of age in 1908, eight years before the bringing of the action. When the mistake was discovered defendant gave up possession of the mortgaged lands; and vouched at the request and to the satisfaction of plaintiff's solicitor an account showing an agreed balance due by her. The account was furnished and vouched on the basis that she was accountable for surplus rents misapplied during the preceding six years. Plaintiff, becoming dissatisfied with the basis of the account, now sought to make defendant accountable for the surplus rents for the preceding eleven years from 1904. Defendant pleaded, inter alia, the Statutes of Limitations, compromise, plene computavit. *Held* (1), that defendant was accountable for the preceding six years only; (2) that defendant was not accountable as mortgagee or chargeant in possession in respect of the surplus rents misapplied; and (3) that, in any event, plaintiff was bound by the vouched account showing an agreed balance due by defendant. *Lockey* v. *Lockey*, Ch. Prec. 588; *Hickman* v. *Upsall*, 4 Ch. Div. 144; and *Baxter* v. *Hozier*, 5 Bing, N. C. 288; discussed and applied. *Forster* v. *Forster* - - - - BARTON J. 95

LIMITATIONS, STATUTE OF—TRUSTS—Administration — *Chattel real—Next-of-kin of intestate out of possession for more than twelve years, but less than twenty years next before administration decree*—(23 & 24 *Vict. c.* 38), *s.* 13—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 1.] *P. B.* died intestate on 8th August, 1901, leaving a widow and seven children him surviving. A grant of administration to him was taken out by the widow in the following year. The assets of the deceased consisted of a house and farms of chattel real tenure. The widow and five of the children remained in possession of them from the date of the intestate's death. *L. B.* and *M. B.*, two other children of the intestate, had left the home, and had been out of possession for more than twelve years, but less than twenty prior to 1916. One of the five children issued an equity civil bill for administration on the 23rd May, 1916, and the usual primary decree was made on the 28th October, 1916. Notice of this decree was duly served on all the parties interested, including *L. B.* and *M. B.* The Clerk of the Crown and Peace, by his certificate, found that the persons entitled were the widow and five children in possession, but that the title of the remaining two was statute-barred. The certificate was duly con-

LIMITATIONS, STATUTE OF—*continued.*
firmed. A claim to have it varied by admitting *L. B.* and *M. B.* as next-of-kin was disallowed by the County Court Judge of Westmeath. Madden J., at the Spring Assizes, 1917, sitting to hear appeals from the County Court Judge, stated a case for the Court of Appeal under section 8 of the County Court Appeals (Ireland) Act, 1889, upon the question whether *L. B.* and *M. B.* in the above circumstances were entitled to a distributive share of the chattels real. *Held*, that *L. B.* and *M. B.* were so entitled, that the certificate should be amended accordingly, inasmuch as the administratrix held the outstanding personal estate in trust for all those entitled, and not merely for those in possession. *Bermingham* v. *Bermingham* [APP. 436

LOCAL GOVERNMENT — Audit Fee — *Asylum Joint Committee — Committee of County Council—Public Body—Local Government (Ireland) Act*, 1898 (61 & 62 *Vict. c.* 37), *ss.* 9, 64, 84—*Application of Enactments Order*, 1898, *Art.* 19.] A District Asylum Committee is not a Committee of a County Council, and the accounts of a District Asylum Committee are not the accounts of a County Council, and do not come within sect. 64 of the Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), fixing an inclusive fee for auditing the accounts of a County Council. *Local Government Board* v. *Tipperary County Councils* - - - - - - M.R. 211

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MARRIAGE — Condition subsequent in will held not in restraint of - - 41
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MARSHALLING — Rights against third parties—Apportionment—*Successive charges on different estates—Deficiency of funds.*] The owner of two estates, *A* and *B*, and his predecessors in title created incumbrances affecting them — the first on *A* and *B*; the second on *A*; and the third on *A* and *B*. The third incumbrancer had notice of the prior charges. *A* was sold, but the proceeds were not sufficient to pay more than the first incumbrance and part of the second. *B* having been subsequently sold, *Held*, that the owners of the second incumbrance were not entitled to marshall, but only to have an apportionment of the first incumbrance between *A* and *B* and to have a recoupment on this basis. *Archer's Estate*, [1914] 1 I. R. 285, not followed. *Smyth, Owner*; *Toms, Petitioner* - - - Ross J. 338

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MORTGAGEE OF TENANT FOR LIFE — Overholding, account by - - - 33
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NOMINAL REVERSION—Order vesting in new company - - - 356
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POLICE RATE — Dublin Police District — Apportionment - - - 371
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POWER OF APPOINTMENT—Execution—Validity - - - - - 227
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PRACTICE — COURTS (EMERGENCY POWERS)—Leave to institute proceedings —*Judgment mortgage for sum over* £100.] Rule 3, sub-r. 2, of the Irish rules of September, 1914, made under the Courts (Emergency Powers) Act, 1914 (4 & 5 Geo. 5, c. 78), applies to cases within sect. 1, sub-s. 1 (*b*), of the Courts (Emergency Powers) (No. 2) Act, 1916 (6 & 7 Geo. 5, c. 18); and consequently the preliminary application for leave to institute proceedings in the County Court to raise the amount of a judgment mortgage for a sum exceeding £100, registered in 1917 on foot of a judgment for a debt incurred prior to August 4, 1914, was properly made to the High Court. *Henderson* v. *Callan* - - - Ross J. 107

PRACTICE — JURISDICTION — Foreign infant —*Foreign guardian—Trust—Remuneration of trustees for collection of income and acting as solicitors—Costs—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *ss.* 42, 43.] *A* and *B*, the trustees of a will, were solicitors, and became trustees on getting a covenant for remuneration from the tenant for life. The property devolved on an infant tenant in tail, an American citizen, of whose property an American corporation was

PRACTICE—*continued.*
appointed guardian by a competent American Court. On proof that the receipt of the corporation was a good discharge for all income of the infant, and that the corporation had full discretionary power to apply the income for his benefit, the judge made an order allowing *A* and *B* to pay arrears and all accruing income to the corporation, and also authorized them to enter into an agreement with the corporation fixing the remuneration for their services. *In re White, Deceased*; *Ingram* v. *White* - - - BARTON J. 19

PRACTICE—LAND REGISTRY—Application for discharge of equities by interested person not owner - - - 45
See LAND REGISTRY. 1.

PRACTICE—SALE BY THE COURT—Person of unsound mind—*Person appointed to convey—Order by the High Court—Lunacy jurisdiction—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *sects.* 30, 31, 33.] Where, in a partition action, the Court has sold lands, the property of a person of unsound mind not so found, a judge of the Chancery Division exercising the jurisdiction conferred by sections 30, 31, and 33 of the Trustee Act, 1893, will appoint a person to convey the lands on behalf of the person of unsound mind. *Keating* v. *Keating* - - O'CONNOR J. 453

PRACTICE—THIRD-PARTY PROCEDURE—Indemnity—*Analogous procedure under Order* 16, *r.* 55.] The plaintiff sought a declaration of trust in respect of lands conveyed by the first defendant to the predecessor in title of the second defendant. The second defendant claimed, by way of indemnity against the first defendant, such damages as might be suffered by reason of any breach of covenants for title entered into by the first defendant in the conveyance. *Held*, that the procedure under Order 16, rule 55, analogous to third-party procedure under Order 16, rule 48 (which applies where a defendant seeks contribution or indemnity against a co-defendant), was inapplicable. *M'Mahon* v. *M'Mahon*.
[O'CONNOR J. 410

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PRIORITY OF INDEMNITY—Receiver—Executor - - - - - 366
See ADMINISTRATION — PRIORITY OF DEBTS.

PRIVILEGE—Judge—Words uttered in course of judicial proceedings - - 245
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PROFIT À PRENDRE—Turbary—Reservation — *Perpetuity — Vesting Order — Superior Interest.*] There cannot be a grant of a profit à prendre appurtenant without a capable grantee. A series of residents in a house are not capable grantees. The plaintiff's father conveyed to the plaintiff his life estate in certain lands, and his estate in fee in certain other lands, including *F.* bog, retaining the mansion house and demesne of *M.* (of which he was tenant for life and the plaintiff remainder), and the house of *F.* (of which he was owner in fee). The conveyance contained the following reservation:—"Excepting and reserving out of the said bog of *F.* to the person or persons who now or at any future time shall reside in the mansion house of *M.* or in *F.* house, the right of cutting turf exclusively for consumption in the said mansion house of *M.* and in the house of *F.*, and to include a reasonable right of access to the said bog for the purpose of exercising such right of turbary." In May, 1912, the parties having failed to agree, the Congested Districts Board made a final offer to purchase from the plaintiff the estates, including *F.* bog. In July, 1912, the plaintiff, as remainderman as to *M.* and as devisee as to *F.*, succeeded his father as owner in possession of the mansion house of *M.* and the house of *F.* Plaintiff, having claimed a right of turbary in the *F.* bog, his right was admitted both by the Irish Land Commission and by the Congested Districts Board, and was recognized on the face of the vesting order vesting the lands in the Board. In an action by the plaintiff to enforce such right of turbary, *held*, by the Court of Appeal (affirming Barton J.), that the reservation conveyed no right of turbary extending beyond the life of the grantee, and that the action should be dismissed on this point. *Held* by Sir I. O'Brien C. (Ronan L.J. dissentiente), that if the reservation in the deed had been valid, it would not have been ultra vires the Land Commission to make the vesting order subject to such reservation; and that in this respect there is no logical difference between ordinary sales and final-offer cases. Per Molony L.J., that as the Congested Districts Board were registered as full owners of the lands subject to the express reservation, the latter could only be got rid of by substantive proceedings, under the Local Registration of Title Act, 1891, to rectify the Register. The right of the Irish Land Commission to make vesting orders subject to reservations considered. *Westropp* v. *Congested Districts Board*
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REALTY OR PERSONALTY—Valuation of Registered freehold land under Intestates' Estates Act - - - - - 488
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SETTLED LAND ACTS—Capital Money—Investment—*Sporting rights—Incorporeal hereditament—Privilege convenient to be held with the settled land—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 10 (i), *s.* 21 (vii) (viii).] Capital money may in a proper case be invested in the purchase of sporting rights, such rights being a privilege convenient to be held with the settled land within the meaning of sect. 21 (viii) of the Settled Land Act, 1882. Query whether sporting rights are incorporeal hereditaments which can be purchased with capital money as being a purchase of "land in fee-simple" within the meaning of sect. 21 (viii) of the Act. *In re Earl of Portarlington's Settled Estates* - - - - M. R. 362

SETTLEMENT — Equitable interests in realty — *No words of limitation — Trust to convey—Period of distribution.*] By a marriage settlement real property was conveyed to a trustee upon trust, after the solemnization of the marriage, to permit the wife to receive the rents for her life, then to permit the husband to receive the rents for his life, should he survive, then upon trust to convey the property to the children of the marriage, subject to appointment, and in default of appointment to the children of the marriage, if more than one, share and share alike, and if only one, then to such only child, and upon further trust, after the death of the survivor of the husband and wife, in case there should not be any issue of the marriage, to convey the property to *S.* and *G.*, sisters of the wife, their and each of their executors, administrators, and assigns; and if either of them should die leaving issue, then upon trust to convey the share of her so dying to her issue, if more than one, share and share alike, and upon trust after the decease of the wife, husband, *S.*, and *G.*, without issue of any of them, to convey the property unto the children of the late *H. B.*, if more than one, share and share alike; and if only one such child, the whole to such only child. There was no issue of the marriage. *S.* and *G.* died unmarried. Both they and the husband died in the lifetime of the wife. She subsequently died. There were ten children of *H. B.* living at the date of the settlement, eight of whom survived the wife. *Held*, by the Court of Appeal (affirming the decision of Wylie J.), that the period of the distribution of the trust estate was the date of the death of the survivor of the wife, husband, *S.* and *G.*, and that, in the events which had happened, the children of *H. B.*, then surviving, were entitled to call for a conveyance. *Colles' Estate* - - APP. 1

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—— 6 & 7 Will. 4, c. 116, s. 60—Presentment to stop up road - - - - - 402
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—— 5 & 6 Vict. c. 35—Income Tax Act, 1842. sect. 102 - - - - - - 30
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—— 23 & 24 Vict. c. 38 - - - 436
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—— 23 & 24 Vict. c. 154, s. 14 - - 140
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—— 34 Vict. c. 22, ss. 68 and 69 - - 417
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—— 37 & 38 Vict. c. 57, s. 1 - - - 140
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—— 37 & 38 Vict. c. 57, s. 1 - - - 436
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—— 40 & 41 Vict. c. 57 (Judicature Act (Ir.), 1877), s. 28, sub-s. 6 - - 433
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—— 44 & 45 Vict. c. 41—Conveyancing Act, 1881, ss. 42, 43 - - - - - 19
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—— 44 & 45 Vict. c. 49, s. 5 - - - 116
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—— 45 & 46 Vict. c. 38, sect. 2, sub-s. 10 (1), sect. 21 (vii) (viii) - - - 362
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—— 46 & 47 Vict. c. 60, s. 15—Labourers Acts
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—— 53 & 54 Vict. c. 29, ss. 1, 5 (Intestates' Estates Act, 1890) - - - 488
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—— 54 & 55 Vict. c. 66, s. 75 - - 417
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—— 54 & 55 Vict. c. 66, ss. 85, 86 - - 488
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—— 56 & 57 Vict. c. 21—Voluntary Conveyances Act, 1893 - - - - 169
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—— 56 & 57 Vict. c. 39 - - 313, 323
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—— 56 & 57 Vict. c. 53, ss. 30, 31, 33 - 453
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—— 56 & 57 Vict. c. 53, s. 25, sub-s. 1; s. 26 356
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—— 61 & 62 Vict. c. 37, s. 65, sub-s. 2; s. 66 [371
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—— 3 Edw. 7, c. 37, s. 83 - - - 116
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—— 7 Ed. 7, c. 47, s. 2—Deceased Wife's Sister Marriage Act - - - - 394
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—— 4 & 5 Geo. 5, c. 78—Courts (Emergency Powers) - - - - - 107
See PRACTICE—COURTS (EMERGENCY POWERS).

—— 5 Geo. 5, c. 12, s. 6—Trading with Enemy. [433
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—— 5 Geo. 5, c. 13—Execution of Trusts (War Facilities) - - - - 359
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—— 5 Geo. 5, c. 37—Defence of the Realm 152
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—— 6 & 7 Geo. 5, c. 18—Courts (Emergency Powers) - - - - - 107
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See PRACTICE—THIRD PARTY PROCEDURE.

TRADING WITH ENEMY - - 433
See ASSIGNMENT.

TRUSTEE — APPOINTMENT — Vesting Order — *Leaseholds — Mortgage by sub-demise to trustee for debenture-holders — Sale by trustee — Dissolution of company — Nominal reversion outstanding—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 25, *sub-s.* 1, *and s.* 26.] A company held certain premises as assignees under several leases. These premises were mortgaged by sub-demise to a trustee for debenture-holders of the company, leaving outstanding in the company the last three days of the terms for which they were held, with the usual declaration of trust of such reversions. The trustee for the debenture-holders sold the premises under the power of sale in the trust deed, and subsequently the company was dissolved, without an assignment of the nominal reversion vested in it having been obtained. The premises having become vested in the applicants, subject to the outstanding nominal reversions, they applied, under sect. 25, sub-s. 1, of the Trustee Act, 1893, to be appointed trustees of such reversions, and for an order vesting the same in them. *Held*, that the application should be granted. Form of order considered. *In re No.* 9 *Bomore Road*, ([1906] 1 Ch. 359) followed. *In re Queenstown Dry Docks Shipbuilding and Engineering Company* - - - M.R. 356

TRUSTEE—POWERS — Charges in equal priority — *Proposed immediate payment of one charge and appropriation to provide for others.*] Certain capital charges declared by the instruments creating them to be in equal priority became payable at different dates. One of the charges amounting to £4000 was immediately payable. The lands charged having been sold, the trustees of the estate applied to the Court asking in substance whether they were at liberty to pay the £4000 charge on setting apart so much of the proceeds of the sale of the estate as should be reasonably likely to secure payment in full of the remaining charges as and when they became payable. *Held*, that the trustees could not pay off the charge of £4000, and segregate the proceeds of the land to meet the charges and thereby absolve themselves from liability. *Lamb* v. *French*
[O'CONNOR J. 420

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VALUATION—Net value of real estate for purposes of Intestates' Estates Act, 1890 488
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VENDOR AND PURCHASER — CONDITIONS OF SALE—Rescission — *Litigation—Objection to title by purchaser upheld by the Court.*] A condition of sale providing that "if the purchaser shall insist on any objection or requisition which the vendor shall be unable or unwilling to remove or comply with, the vendor may . . . at any time thereafter, and notwithstanding any negotiation or litigation in respect of such objection or requisition, or attempts to remove or comply with the same, annul the sale, and shall thereupon return to the purchaser his deposit, but without any interest, costs, or other compensation whatsoever," does not entitle a vendor to rescind without compensation after the purchaser's requisition has been upheld by a judicial decision. *In re Arbib and Class's Contract* ([1891] 1 Ch. 601) followed. *In re Quigley and M'Clay's Contract* - M.R. 347

1. VENDOR AND PURCHASER—TITLE—Defect in conveyance *of real estate—Omission of the word "heirs" in habendum—Intention.*] Premises held under a fee-farm grant were conveyed by way of mortgage to a firm of three solicitors, carrying on business under the name of *M. & Co.* The premises were granted to "*M. & Co.*, their heirs, successors, and assigns, to hold unto and to the use of *M. & Co.*, their successors and assigns." *M. & Co.*, under the statutory power of sale, sold the premises to the predecessors in title of the vendor. The purchaser objected to the title on the ground that by reason of the absence from the habendum of the word "heirs" the conveyance did not pass the fee, but at most an estate for the joint lives of the members of the firm of *M. & Co.* and the survivors and survivor of them. *Held*, that the intention of the conveyance was to give the whole estate to the mortgagees, and that it passed in fee. *In re Fayle and the Irish Feather Company's Contract* - - - M.R. 13

2. VENDOR AND PURCHASER—TITLE—Vendor trustee — Delegation of trust — 5 *Geo.* 5, *c.* 13, *sect.* 1, *sub-s.* 1 — *Power of Attorney.*] Certain premises were put up for sale by auction, the vendors being trustees. One of the vendors being absent on war service, it was proposed that the conveyance to the purchaser should be executed by a person to whom he had purported to delegate the execution of trusts, of which he was a trustee, under the Execution of Trusts (War Facilities) Act, 1914 (5 Geo. 5, c. 13), sect. 1, sub-s. 1. The power of attorney by which the delegation purported to be carried out, though referring to the Act, was in general terms, did not mention the particular settlement in which the premises in question were comprised, and did not deal or purport to deal with realty in any way.

VENDOR AND PURCHASER—*continued.*
The purchaser having objected that the power of attorney was insufficient to enable the conveyance to him to be executed in the manner proposed: *Held*, that the objection was well founded. *In re Donoughmore and Hackett's Contract* M.R. 359

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See EXECUTOR.

WILL—ABSOLUTE BEQUEST—Gift over *in the event of the legatee dying childless—Validity of gift over.*] A testator bequeathed certain farms held as yearly tenancies to his son *J.* and his heirs, and in case of his son *J.* dying childless he directed that the farms should be given to his son *P.* Both *J.* and *P.* survived the testator, and both died without ever having had children, *P.* in 1882 and *J.* in 1917. *Held*, that the gift over was valid, and that the personal representative of *P.* was entitled to the farms. A gift over which is intended to have, or in fact has, the effect of preventing the exercise of a legal right attached to the estate devised is invalid. *Shaw* v. *Ford*, 7 Ch. D. 669, considered and distinguished. *In re O'Hare, Madden* v. *M'Givern* - - M. R. 160
[Affirmed by C. A.]

WILL—ADEMPTION—Bequest of chattel real—*Agreement for sale prior to bequest—Sale completed after testator's death — Purchase-money paid to executors—Legacies how payable—Residuary Gift—Debts and testamentary expenses.*] After certain pecuniary legacies and bequests of chattels a testator provided as follows:—"Subject to the foregoing I will devise and bequeath my lands of T. unto *J.* . . . and I direct that he shall pay thereout the foregoing legacies and obligations and in case the said *J.* is not willing to accept this devise and bequest I direct that all my lands cattle goods and chattels be sold by public auction and that the foregoing legacies obligations and bequests be paid and discharged thereout and that the residue of my estate be paid to *C.*" The testator, at the date of his death, was possessed of certain lands of T., held under a statutory tenancy. At the date of the execution of his will he had entered into an agreement for sale of other lands of T, also held under a statutory tenancy, and after his death the sale was completed, and the purchase-money (a sum of £650) was paid to his executors. *Held*, 1. That the sum of £650 was undisposed of by the will, and passed as on intestacy to the next-of-kin. 2. That the residuary bequest in favour of *C.* was contingent on an event which had not happened, and that it failed. 3. That the debts and testamentary expenses were payable primarily out of the undisposed of residuary estate. 4. That the legacies were primarily payable out of the property bequeathed to *J.* *Guiry* v. *Condon*
[BARTON J. 23

WILL—ADEMPTION—Gift of share of partnership *property of ascertained amount—Lunacy of Testatrix—Withdrawal of share and investment in Consols.*] A testatrix, a partner in a school, bequeathed her share to one of the partners in the following terms:—"To *A. W.* I bequeath my share in the furniture and goodwill in the F. School which amount to £600." The agreement of partnership, executed shortly after the date of the will, provided that upon the withdrawal of any partner the continuing partners should have the option to purchase the share of the withdrawing partner for £600. Shortly after the execution of the partnership agreement the testatrix was found a lunatic, and under an order in the lunacy matter the continuing partners lodged £600 to the credit of the matter, and it was invested in Consols. Upon the death of the lunatic the question arose whether the legacy had been adeemed. *Held*, that it was unnecessary to decide whether the order in lunacy worked an ademption, as the bequest was of an ascertained sum of £600, and that the legatee was entitled to the Consols in which the £600 had been invested. *Vuille, deceased*; *Hayes* v. *Williams*
[M. R. 6

WILL—APPOINTMENT of definite sums and a "balance"—*Lapse of appointed sum—Inclusion of in "balance."*] By a marriage settlement and a contemporaneous deed certain stocks and shares the particulars and values whereof were set out in the settlement) and certain shares in a Mexican Hacienda were transferred to trustees upon trust, after the wife's death, and in the events that happened, for her brothers and sisters, or their issue, in such shares as she should by will appoint, and in default of appointment for the persons who would have been entitled thereto under the Statute of Distributions on the wife's death if she had died possessed thereof intestate, as tenants in common. The wife by her will directed and appointed that the trustees should after her decease stand possessed of the said property in trust to pay to her sister

WILL—*continued.*

E. £2.000 and to her sister *B.* £1,000, and as to the balance of the trust funds to hold the same for her brother *M.* and the said *E.* in equal shares. *B.* died in the testatrix's lifetime and the appointment of the £1,000 to her lapsed. *Held*, that the £1,000 passed to *M.* and *E.* as part of the "balance," and did not devolve as in default of appointment. *Burke Irwin's Trusts*; *Barrett* v. *Barrett* - - - - - - Ross J. 350

WILL — CONDITION — Restraint of marriage — *Condition subsequent.*] A testator bequeathed a house held for a chattel term and the furniture and contents thereof to his sister and her unmarried daughters during her life, and after her death he bequeathed "said house and furniture equally to my said nieces but I direct that if any of my said nieces shall marry she shall thereupon forfeit her share and interest in this bequest and the said house and its contents shall go to such of my nieces as shall remain unmarried in equal shares or to the unmarried nieces absolutely." The testator died in 1903, leaving his sister and her three unmarried daughters surviving him. One daughter married in 1905, and a second died a spinster in 1915. The sister died in 1916. The third daughter survived her mother, and was unmarried. *Held*, that the intention of the testator was to limit the property until marriage, and not to impose a condition in restraint of marriage, and, accordingly, that in the events that had happened, the surviving unmarried daughter was absolutely entitled to the property. *Elliott, Deceased*; *Montgomery* v. *Potterton*.

[BARTON J. 41

WILL — WORDS — Punctuation — *Gift of farm and chattels to wife to manage to best advantage of self and children — Trust—Joint tenancy—Beneficial interest.*] A testator left his farm and chattels to his wife "she to have and manage same to the best advantage to herself and her five children (naming them)." *Held*, that the widow took as trustee for herself and her five children as joint tenants. It is from the words and context of a will and not from the punctuation that the sense must be collected. *Campbell, deceased*; *M'Cabe* v. *Campbell* O'CONNOR J. 429

WILL — LAPSE—Residuary bequest to persons as joint tenants—*Death of residuary legatees before testatrix—Lapse—One of residuary legatees leaving issue—Wills Act*, 1837 (1 *Vict. 26*), *s.* 33—*Next-of-kin—Marriage with deceased wife's sister prior to* 1907—*Right of issue of such marriage to share in undisposed of residue with issue by former marriage—Deceased Wife's Sister's Marriage Act*. 1907 (7 *Edw.* 7, *c.* 47), *s.* 2.] A testatrix by her will nominated her two sons, *A* and *B*, her residuary legatees. Both *A* and *B* predeceased the testatrix. *A* died in 1899, leaving issue a son, *X*, who survived the testatrix. *B* died in 1912 without issue. *Held*, that sect. 33 of the Wills Act, 1837, does not apply to a joint legacy, and that the testatrix had died intestate as to her residuary personal estate. Statement in Jarman on Wills, 6th ed., p. 449, approved. In addition to *A* and *B*, the testatrix had had two children by a second marriage, both of whom survived her. This marriage, which was contracted prior to 1907, was with the husband of her deceased sister. *Held*, that the children of the second marriage were entitled to share in the undisposed of personal estate of the testatrix equally with her grandson by her first marriage, just as if the second marriage had always been legal. A prospective next-of-kin of a living person has not got such a title or interest as is saved by sect. 2 of the Deceased Wife's Sister's Marriage Act, 1907. *In re Beaupré's Trusts* (21 L.R.I. 397) distinguished. *In re Butler, Joyce* v. *Brew* M.R. 394

WILL — SOLICITOR-EXECUTOR — Profit costs — Priority — *Legacy — Estate insufficient to pay all legacies — Condition that legatee should execute a settlement—Condition subsequent—Non-performance—Forfeiture—Gift over.*] Where an estate is solvent but insufficient to pay legacies in full, the profit costs of a solicitor given to him by the will of the testatrix, of which he is appointed executor and trustee, do not take priority over other legacies. A testatrix appointed trustees of her will, and directed them to set apart a sum of £1000, to hold the same on trust from the expiration of one year after her death, subject to the proviso thereinafter appearing respecting such sum and the limitations thereof, to pay the income to her daughter *M.* for her life, and after her death for her children or remoter issue, as *M.* should by deed or will appoint, with certain remainders over in default of appointment and in default of issue, and directed that *M.* should within one year from her (testatrix's) death execute a settlement of certain interests to which she should become entitled under the will upon certain specified trusts, and directed that in the event of *M.* neglecting or declining to carry out that direction the trusts concerning her life estate in the sum of £1000, and all ulterior trusts thereof, should be deemed of no effect; and there was then a gift over in favour of another daughter and her issue. Testatrix also directed that her solicitor (trustee and executor of her will) should act in carrying out the trusts of the will, and in the preparation and execution of any deeds to be executed for the carrying out of the desire and

WILL—*continued.*
intention of the testatrix. The will was read over and explained by the solicitor-trustee to the legatee, but the Court came to the conclusion that she did not clearly understand its provisions. She expressed herself willing to sign any document that the solicitor-trustee should supply to her. She never executed any settlement in pursuance of the direction in the will. More than one year had elapsed since the death of the testatrix. *Held*, that the solicitor-trustee was not under any obligation to prepare or submit any particular document to the legatee for execution, and that as she had not complied with the condition she forfeited the legacy, and the gift over took effect. *O'Higgins* v. *Walsh* BARTON J. 126

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THE END.